In the Supreme Court

Of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, Plaintiff in Error, vs. FRANK. W. ROLLINS, Defendant in Error.	No. 1347.

STATEMENT OF THE CASE.

This is an action upon county warrants. The complaint alleges that the warrants in question were issued and presented to the treasurer for payment, and by him duly endorsed and registered, and that, "subsequent to such registration, the plaintiff bought and purchased said warrants for a valuable consideration, and is now the owner and holder thereof." (Record p. 18.)

The answer contains several defenses. The second defense consists largely of a specific denial of the allegations of the complaint. As to the ownership of the warrants, it is denied that at any time heretofore the said plaintiff bought or purchased said supposed warrants, or orders, or

any or either of them, or any part thereof, for a valuable consideraton, or otherwise, or that he bought or purchased them at all, or that he was, at the time of the commencement of this action, or that he is now, the owner or holder of any of said alleged warrants or orders, or any or either of them, or any part thereof, for value or otherwise. (Record p. 34.) The want of ownership was also affirmatively asserted in the fourth defense. (Record p. 35.) In the fifth defense the answer alleges that the alleged warrants were issued after the limitation of indebtedness prescribed by the constitution (Art. 11 Sec. 6) had been reached and exceeded. (Record pp. 35–38.) In the ninth defense the answer alleges that the said supposed warrants were made payable to the respective payees therein, and that such payees were, at the time such warrants were issued, and, also, at the time of the commencement of this action, citizens and residents of the state of Colorado. (Record pp. 39–40.)

The replication is chiefly directed to the fifth defense, and sets up certain facts which the pleader thinks should be considered in construing the constitution. As to the ninth defense, the replication asserts that the warrants were issued payable to bearer, and are due and payable to plaintiff without endorsement or assignment. (Record pp. 41–51.)

The bill of exceptions shows that the cause was submitted upon an agreed statement of facts. (Record pp. 53-54.) This agreed statement of facts sets forth something of the history of the indebtedness of the several counties of the state; certain proceedings of the constitutional convention and the address of the convention to the people of the state. (Record pp. 54–83.) As to the condition of the indebtedness of the county at the time the warrants in question were issued, it is distinctly agreed that if section six of article eleven of the constitution is construed

to be a limitation upon *all* indebtedness, then the plaintiff in error was entitled to judgment in its favor on its fifth defense. (Record p. 70.)

The bill of exceptions also contains the opinion of the court. (Record pp. 85–93.) A motion for a new trial was made and overruled. (Record pp. 94–95.) The record contains an assignment of errors. (Record pp. 101–103.)

It will be seen that there is absolutely nothing in the agreed statement of facts (and no evidence of any kind was introduced, other than this agreed statement) upon the question of ownership of these warrants.

Constitutional provisions upon the subject of the limitation of the indebtedness of counties have been adopted in Iowa (Art. 11 Sec. 3) in 1857; in Illinois (Art. 9 Sec. 12) in 1870; in West Virginia (Art. 10 Sec. 8) in 1872; in Pennsylvania (Art. 9 Sec 8) in 1873; in Wisconsin (Art. 11 Sec. 3) in 1874; in Missouri (Art. 10 Sec. 12) in 1875; and Colorado (Art. 11 Sec. 6) in 1876. These provisions are as follows:

Iowa: "No county or other political or municipal corporation shall be allowed to become indebted *in any manner, or for any purpose, to an amount in the aggregate exceeding* five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax-lists previous to the incurring of such indebtedness."

Illinois: "No county, city, township, school district or other municipal corporation shall be allowed to become indebted *in any manner or for any purpose to an amount,* including existing indebtedness, *in the aggregate exceeding* five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation, incurring any indebtedness as

aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

West Virginia: "No county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted *in any manner or for any purpose, to an amount*, including existing indebtedness, *in the aggregate, exceeding* five per centum on the value of taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness; nor without at the same time providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof, within and not exceeding thirty-four years."

Wisconsin: "No county, city, town, village, school district or other municipal corporation shall be allowed to become indebted, *in any manner or for any purpose, to any amount, including existing indebtedness, in the aggregate, exceeding* five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any county, city, town, village, school district or other municipal corporation incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

Pennsylvania: "The debt of any county, city, borough, township, school district or other municipality or incorporated district, except as herein provided, shall never

exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election, in such manner as shall be provided by law; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum in the aggregate at any time, upon such valuation."

Missouri: "No county, city, town, township, school district or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness; *provided*, that, with such assent, any county may be allowed to become indebted to a larger amount for the erection of a court house or jail; *and provided further*, that any county, city, town, township, school district, or other political corporation or subdivision of the state incurring any indebtedness, requiring the assent of the voters aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof

within twenty years from the time of contracting the same."

Colorado: "No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making and repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *provided*, that this section shall not apply to counties having a valuation of less than one million of dollars."

Other provisions of the constitution of Colorado which it may be necessary to consider are as follows:

The rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation; and whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not

exceed four mills on each dollar of valuation; and whenever the taxable property within the state shall amount to three hundred million dollars, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the state as in the year next preceding such election shall have paid a property tax assessed to them within the state, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law. (Const. Art. 10 Sec. 11.)

No appropriation shall be made nor any expenditure authorized by the general assembly whereby the expenditure of the state during any fiscal year shall exceed the tax then provided for by law and applicable for such appropriation or expenditure unless the general assembly making such appropriation shall provide for levying a sufficient tax not exceeding the rate allowed in section eleven of this article to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war. (Const. Art. 10 Sec. 16.)

The state shall not contract any debt by loan in any form except to provide for casual deficiencies of revenue, erect public buildings for use of the state, suppress insurrections, defend the state, or, in time of war, assist in defending the United States; and the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the state, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of said valuation until the valuation shall equal one hundred

millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars, and the debt incurred in any one year for erection of public buildings shall not exceed one-half mill on each dollar of said valuation, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars (except as provided in section five of this article) and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt. (Const. Art. 11 Sec. 3.)

No city or town shall contract any debt by loan in any form, except by means of an ordinance, which shall be irrepealable, until the indebtedness therein provided for shall have been fully paid or discharged; specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve (12) mills on each dollar of valuation of taxable property within such city or town, sufficient to pay the annual interest, and extinguish the principal of such debt within fifteen, but not less than ten years from the creation thereof; and such tax, when collected, shall be applied only to the purposes in such ordinance specified, until the indebtedness shall be paid or discharged. But no such debt shall be created unless the question of incurring the same shall at a regular election for councilmen, aldermen or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting on the question, by ballot deposited in a special ballot box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent. of the valuation last aforesaid. Debts contracted for supplying water to such city or town are excepted from the operation of

this section. The valuation in this section mentioned shall be in all cases that of the assessment next preceding the last assessment before the adoption of such ordinance. (Const. Art. 11 Sec. 8.)

Certain statutory provisions, which will be referred to in argument, but not set forth in full, are as follows:

County orders shall be signed by the chairman and attested by the clerk, and shall specify the nature of the claim or service for which they were issued. (Genl. Stat. Sec. 546.)

Such clerk shall not sign or issue any county order, unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose. (Genl. Stat. Sec. 556.)

All promissory notes, bonds, due-bills and other instruments in writing, made payable by any person, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property, to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom the said note, bond, bill or other instrument in writing is made. (Genl. Stat. Sec. 103.)

Any such note, bill, bond or other instrument in writing, made payable to any person or persons, shall be assignable by endorsement thereon, under the hand of such person and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively. (Genl. Stat. Sec. 104.)

The sixth defense raises a question respecting the stat-

ute of limitations as applied to actions upon certain warrants specified therein.

The court below, in its opinion, says: "I believe that it is agreed between counsel that the warrants sued on in this action are of this nature, and the judgment must be entered, therefore, in favor of the plaintiff." The court means by this that it is agreed that the warrants in suit were issued for what is called compulsory obligations. No such agreement has ever been made. Nothing of the kind can be found in the pleadings or the agreed statement of facts. And it will be found that a large portion of the warrants sued upon, can upon no theory be considered as having been issued for so-called compulsory obligations.

BRIEF OF PLAINTIFF IN ERROR.

The principal questions which arise upon the record are: (1.) Whether there is anything in the record, irrespective of the constitutional limitation of indebtedness, upon which the judgment can stand. (2.) Whether the constitutional limitation embraces indebtedness other than that contracted by *loan*. (3.) Whether, if it does embrace indebtedness other than that contracted by loan, it embraces such indebtedness as that sued upon.

I.

The complaint alleges that the plaintiff bought and purchased these warrants for a valuable consideration, and is now the owner and holder thereof. The answer denies these allegations, negativing the very language in which they are made. And there is absolutely no proof upon the subject. There is no allegation that these warrants were ever assigned or endorsed to the plaintiff, and the reverse of this is to be inferred, for the replication alleges that they were issued payable to bearer, and are

due and payable to plaintiff without *endorsement or assignment.* The form of these warrants, as set forth in the complaint, shows that they are made payable to certain persons, as payees, or bearer; and the complaint alleges that the list of warrants set forth therein were issued "to the persons as herein named, for the purposes as herein set forth, and of the amount as herein stated."

One substantial and meritorious question which the defendant sought to raise, whether treated as a question of pleading or an issue of fact, is that the payees never endorsed these warrants, and that plaintiff can maintain no action upon them without such endorsement. The statute (Gen. Stat. Secs. 103 and 104) provides that all promissory notes, bonds, due-bills and other instruments in writing, made by any person, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom the said note, bond, bill or other instrument in writing is made, and that any such note, bill, bond or other instrument in writing, made payable to any person or persons, shall be assignable by endorsement thereon, under the hand of such person and of his assignee, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively. The statute (*id.* Sec. 105) then provides for such assignee bringing suit, and (*id.* Sec. 107) for the qualified liability of the assignor. Is a county warrant or order such an instrument in writing as is contemplated by this statute? It is probably not a promise to pay, but is it not an instrument in writing by which it is acknowledged that a sum of money is due? Our statute is a literal transcript of the statute of

Illinois, and it was decided there, before its adoption here, that no transfer of the legal title to a written instrument within the terms of the statute, could be made, except by endorsement, as the form of transfer prescribed by the statute "necessarily excludes all other modes of transfer." (Hilborn vs. Artus 3 Scam. 344; Shippington vs. Pulliam *id.* 385; New Hope etc. vs. Perry 11 Ill. 468; Roosa vs. Crist 17 *id.* 450; Wilder vs. DeWolf 24 *id.* 190.) It has also been expressly decided that a county warrant or order is such an instrument in writing as is contemplated by this statute. (Garvin vs. Wiswell 83 Ill. 215.)

In California it is held that a county warrant made payable to the payee or bearer can only be transferred by endorsement so as to enable the assignee to bring suit upon it. (Martin vs. San Francisco 16 Cal. 285.) In People vs. Gray (23 Cal. 125) the court said: "It is clear that the county treasurer cannot be compelled to pay a county warrant to any other person than the one in whose favor it is drawn, without at least an assignment of the warrant by the payee."

II.

Can the constitutional provision (Art. II Sec. 6) be construed to be only a limitation upon the contraction of indebtedness, *by loan*, for the purpose of erecting necessary public buildings, and making and repairing public roads and bridges? Why should the framers of the constitution have placed a limitation upon indebtedness to be incurred for these purposes, and for no other? It will be seen that these purposes were being favored rather than discriminated against. They were the only purposes for which money could be borrowed. It is not likely that the convention in the same section would be actuated by such conflicting and inconsistent motives and policies as to declare that they would *favor* these purposes by allow-

ing counties to borrow money to a certain amount, and incur a certain other amount of indebtedness otherwise than by loan, in their advancement, and then turn round and say that the debt for these purposes shall be limited to a certain amount, while the debt for all other purporses, already thus discriminated against, may be wholly without limit. A convention will not be convicted of any such inconsistency unless such construction is imperative. But the language does not admit of this construction. The section treats of two distinct subjects. The first eight lines of the section, as published in the revised laws of 1883, relate to and exhaust one subject. This subject is the indebtedness which may be contracted in any *one year, by loan*, for erecting necessary public buildings and making and repairing public roads and bridges. It is not a limitation upon the total debt which may be contracted in one year for this purpose, but upon that which may be contracted *by loan*. The words "such indebtedness" clearly refer, not only to debt for the special purposes, but such as is contracted by loan. It was not intended that there should be any limitation in the amount which might be expended for these purposes. There is nothing in the constitution which would prevent the people of a county from building their court house out of gold or paving their highways with silver. They can do anything they wish if they pay for it. The limitation is on the borrowing power. But this power can be exercised as often as the loan is discharged. Only a certain amount can be borrowed each year, but when the amount borrowed one year is paid, then the same amount can be borrowed the next year for the same purpose. But this is not a limitation on the amount that may be expended or the amount of debt that may be incurred in one year, for these special purposes. Other expenditures for these purposes may be made, and other

debts may be contracted therefor in the same year, but they must not be *by loan*. In determining, however, what the amount of this additional indebtedness and expenditure may be, the other and aggregate indebtedness of the county must be taken into calculation. And here we come to a consideration of the meaning of the clause contained in the ninth, tenth and eleventh lines of the section. Upon this inquiry, we are to look at the history of the times preceding the convention, in order to ascertain the mischief that it was sought to remedy, for the purpose of arriving at the intention of the convention and the people in framing and adopting this provision. During the ten or fifteen years preceding 1876, an evil of gigantic proportions had appeared in the land. This evil had been fitly characterized as a *mania* on the part of counties and other municipal corporations to incur public debt. In 1876 this municipal indebtedness was estimated at nine hundred million dollars. (Dillon Mun. Bonds 3.) This, together with the national debt, amounted to about ten per centum of the assessed valuation of all the property of the United States. (Burrow's Pub. Sec. Sec. 1.) It is true that such indebtedness was largely in the form of bonds issued to corporations in payment of subscriptions to railroads and for the advancement of other schemes of internal improvement, and bonds issued for money borrowed, or rather bonds issued and sold for what they would bring, to raise money for public purposes. The former of these last-named purposes was placed under the ban of an absolute prohibition (The Colorado etc. vs. Lea 5 Colo. 192), while the latter was regulated by the first clause of this section. But this was by no means the full extent of the evil. Another convenient mode of incurring public indebtedness was by issuing warrants, not upon a fund that was in the treasury, but with full knowl-

edge on the part of the agents of the corporation and the persons dealing with them, that there was no money in the treasury to pay the warrants, and would not and could not be for years to come. This was incurring a debt to be paid in the future; it was anticipating the revenues of future years; it was a debt drawing interest, and is subject to all the objections which can be made to a bonded indebtedness. A warrant indebtedness usually becomes a bonded indebtedness. Five hundred thousand dollars of the bonded indebtedness of Lake county was originally a warrant indebtedness, for which funding bonds were issued. The court will take judicial notice, from the amount of special and general legislation which had been had before the adoption of the constitution, on the subject of funding warrant indebtedness, that the incurring of debt in this form had become an evil of no less magnitude than the incurring the same in other forms. It would be a reflection upon the intelligence of the men composing the convention, in view of the magnitude of this evil, to suppose that they intended to limit the debt that could be incurred for some special purposes, and in one particular form, and leave the evil itself practically unchecked. The temptations to extravagance and jobbery are equal, whether the debt is to be evidenced by bond or by warrant. The vicious practice of anticipating and encumbering the future is equal in either case. The safe rule that a person or corporation ought to "pay as they go," is violated as much in one case as the other. If a scheme is proposed involving public expenditure, and a warrant can be issued with a perfectly well understood uncertainty as to when it will be paid, and with the expectation that it will have to be funded, and paid, if ever paid, at the end of a term of years, who shall say that there is less objection to this proceeding than the issuance of a bond at once? Can the ingenuity of man conceive

a single objection that applies in one case which does not apply, in its full force, to the other? Let us see what the courts have declared was the mischief to be remedied by this class of constitutional provisions, and the purpose had in view in adopting them.

In Appeal of the City of Erie (91 Pa. St. 398), on page 402, the court said: "It is idle to urge that the restriction includes only a *bonded indebtedness*, for such is neither the constitutional *letter nor spirit*. A floating debt usually ends in a bonded debt, and the former is just as obligatory as the latter. What difference does it make to the overtaxed citizen whether the debt his property is confiscated to pay is called *floating or bonded?*" In Law vs. People (87 Ill. 385), on page 396, the court said: "The clear and unmistakable purpose of the framers of the organic law, by inserting this provision, was to effectually protect persons residing in municipalities from the abuse of their credit, and the consequent oppression of burdensome taxation. There could, we think, have been no other purpose, and this is made manifest from the experience of the past." In Prince vs. City (105 Ill. 138), on page 142, the court said: "While the provision of the constitution just cited declares, in emphatic terms, that a city or other municipality whose existing indebtedness already exceeds the constitutional limit, as was the case here, shall not become further indebted, *in any manner or for any purpose*, it is seriously contended by counsel for appellant that a municipality thus circumstanced may become indebted *for supplies to meet its ordinary wants and necessities*. To so construe the constitution would be to add a provision, in the nature of an exception, to the constitution, which the framers of that instrument did not see fit to insert. This, as is well settled by an unbroken current of authority, is not permissible where the language of the law is clear and unambiguous, as is the case

here, except where to give effect to the language used, according to its literal terms, would lead to a gross absurdity, or manifest wrong or inconsistency, which courts will not impute to a legislative body. That any such consequence will flow from giving effect to this provision of the constitution, according to the obvious meaning of the language in which it is conceived, will hardly be claimed by any one. The object and purpose of the framers of the constitution in adopting this provision have, on more than one occasion, received the deliberate and mature consideration of this court, and we do not feel called upon to repeat what we have already said upon the subject, but will content ourselves with a reference to the cases containing the previously expressed views of this court in relation to it." In Prince vs. City (105 Ill. 215) the court said: "To this defense, which is conceded to be true, it is replied in substance that the indebtedness sued for was incurred and made by the city authorities in providing for the *ordinary or current expenses of the city government.* The conclusive rejoinder to this position is, that the city authorities, when brought within this provision of the constitution, are just as powerless to create a debt on account of ordinary or current expenses as they are on account of anything else. When once brought within the provision they have no power to create a debt at all, and this is expressly decided in the case of City of Springfield vs. Edwards (84 Ill. 626.) It was there said, in discussing this very question: 'And since the *purpose of the debt is expressly excluded from consideration,* it can make no difference whether the debt be for necessary current expenses, or for something else.' This can no longer be regarded as an open question." In City vs. Stewart (51 Iowa 385), on page 393, the court said: "The appellant insists that the order is erroneous because, in estimating the amount of the plaintiff's indebtedness, the *outstanding*

warrants are included and counted. It is urged that the constitutional inhibition applies only to bonded indebtedness, and is not applicable to outstanding warrants issued for current city expenses. * * * The language of this provision is very general and comprehensive. It includes indebtedness incurred in any manner, or for any purpose. We would not be justified in limiting it by construction, as contended for by appellant. * * * The language of the constitutional provision is not susceptible of a construction thus limiting it. The court did not err in holding that the amount of the outstanding warrants should be considered in determining the amount of plaintiff's indebtedness." The same view was held in other cases in that state: (Scott vs. City of Davenport 34 Iowa 208; Grant vs. City of Davenport 36 Iowa 396; French vs. City of Burlington 42 Iowa 614.) In Buchanan vs. Litchfield (102 U. S. 278), on page 287, the court said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15, 1873, to incur indebtedness in the construction and maintenance of a system of water-works, could have been lawfully exercised by a city, incorporated town, or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur."

There can be no doubt but that every constitutional convention which had adopted a provision on the subject of the limitation of municipal indebtedness, prior to 1876,

intended the limitation to apply to all indebtedness, wholly irrespective of the manner in which it was contracted, the form in which it was evidenced, or the purpose for which the obligation was entered into; and the presumption is that the framers of the constitution of this state, when dealing with a grave question, had the provisions of all other constitutions, relating to this subject, before them; that such provisions were understood and rightly construed; and that if language of similar import was used in framing our constitution, it was done in execution of the same policy and with the same intent as when used in the other states. In The Wisconsin etc. vs. Taylor (52 Wis. 37), on page 62, the court said: "Thus it appears that prior to the adoption of our state constitution, ten states had each undertaken, by its constitution, to limit the powers of its legislature on the subject of taxation. The other states then forming the Union were at that time without limitations on the subject. Our constitutional convention contained many able men, and several able lawyers. In the important work of devising and adopting a constitution, we must assume that they carefully examined the constitutions of the several states, especially upon so important a subject as that of taxation. To do otherwise would have been a dereliction of duty that no one who is acquainted with the men would think of for a moment." Can there be any doubt that what the court here presumes was the very fact as to the provision in question? Take the clauses of the constitutions of Illinois and this state, and is not the limitation for all purposes as plainly expressed in one as in the other? It may be said that the words "in any manner," as found in the Illinois constitution, are left out of ours, but these words are mere surplusage. A limitation for all purposes excludes the idea that the limitation may be exceeded for any purpose or in any manner. The indebted-

ness itself is limited, and limited for all purposes. To say that the limitation shall not be exceeded in any manner is but to repeat the proposition without giving it any emphasis. The limitation upon all forms of indebtedness is involved in the limitation for all purposes. This was evidently comprehended by the person who drew our section, with all the provisions upon the same subject as found in other constitutions, before him. He used terms which expressed the same intent and which should receive the same construction.

In arriving at the intention, we should consider all provisions of the constitution upon the general subject of limitation of indebtedness, and, when we do this, we find that there are limitations of the aggregate amount of indebtedness which can be incurred either by the state, counties, cities or towns. The constitution (Secs. 11 and 16 Art. 10, and Sec. 3 Art. 11) clearly proves a limitation upon the part of the state. By Sec. 3 Art. 11 the state is prohibited from contracting any debt *by loan* in any form except (1) to provide for casual deficiencies of revenue, (2) to erect public buildings for use of the state, and (3) to suppress insurrection, defend the state, or, in time of war, assist in defending the United States. For the first purpose a limitation is prescribed, first, for the amount that may be borrowed in any *one year*, and second, for the aggregate amount of *such debt* at *any time*, until the valuation shall equal one hundred millions of dollars, and thereafter *such debt* shall not exceed one hundred thousand dollars. For the second purpose, the debt incurred in any *one year* is limited to a certain amount, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars, except by a vote of the people, when it may be increased to three mills on the dollar of valuation. The debt which may be contracted for suppressing insurrec-

tion, defending the state or assisting in defending the United States, is nowhere limited, either as to form or amount. It is not so plain as to whether this section three is a limitation upon all indebtedness for the two specified purposes, or only a limitation upon that which may be contracted *by loan*. There is a marked distinction between this section and section six. Section three starts off with substantially the same forms of expression as section six, and, taken as a whole, resembles very closely the first eight lines of the latter section. It provides generally that no debt by loan shall be contracted except for specified purposes. In each of the subsequent clauses, fixing the amount of debt which may be contracted for each purpose, general language is employed. It is said "and the amount of debt contracted in any one year to provide for deficiencies of revenue shall not exceed," etc. What debt? Does this mean debt by loan or all debt? It does not not say *such* debt, but uses the word debt in a general sense. But the phrase continues, "and the aggregate amount of *such debt* shall not at any time exceed," etc. What is meant by the words *such debt?* If these words had been used in the former phrase, they would clearly mean debt *by loan*, but, used as they are, they clearly refer to the debt that was last mentioned, and that, we have seen, may be *all debt* or only *debt by loan*, depending on whether the word debt, without being qualified by the word such, is held to refer to debt *by loan*, or considered to mean debt in any form. The same peculiar phraseology is used when making the detailed limitations of debt for the erection of public buildings. The better opinion would be, we think, that where the word *debt*, unconnected with the word *such*, is used in each one of these phrases, it means *all debt*, and that when the words *such debt* are used, they refer to the debt mentioned and included in the general word *debt*, and not to the prior

words *debt by loan.* But however this may be, it is plain that there is no analogy between this section and section six, for there is no clause corresponding with the clause of section six, which is relied upon as a limitation *for all purposes.* But we are not now considering that clause. We started out to prove that there is a limitation upon the state in the contraction of debt *for all purposes,* except the special purpose of defense. If it is not found in the section three, which we have been considering, it is plainly written in sections eleven and sixteen of article ten. We need not analyze these sections. Together, they plainly limit the expenditure of the state during any fiscal year to the amount of tax provided by law, and applicable for such expenditure, unless a tax is provided therefor sufficient to pay the same within the fiscal year. It is held by the courts that an appropriation of the levies of taxes already made, or the making of an appropriation, and providing at the same time a tax to pay for the expenditure, is not, in any sense, the contracting of a debt. (City vs. Edwards 84 Ill. 626; Law vs. People 87 Ill. 385). But even if this were not the case, the expenditure is limited by section sixteen to the tax, and the tax is limited by section eleven to a certain rate, so that, taking the two sections together, there is a plain limitation upon the aggregate expenditures which the state can make for all purposes.

It has been seriously contended by the counsel for defendant in error that there is to be found in the constitutution no limitation upon the debt which may be contracted by cities or towns, except such as is contracted *by loan.* To ascertain as to the correctness of this position we go to section eight of article eleven. This section provides that no city or town shall contract any debt *by loan,* except by an irrepealable ordinance providing for the levying of a tax to pay the principal and interest at and within

designated times. To incur *such debt* there must be a vote of the people. The section then declares, "but the *aggregate* amount of debt so created, *together with the debt existing at the time of such election*, shall not at any time exceed three per centum of the valuation last aforesaid. Debts contracted for supplying water to such city or town are excepted from the operation of this section." It will be noticed that in this section, as in section three already discussed, wherever there is a reference to a debt previously mentioned the word "such" is carefully inserted. To carry out the theory of the counsel for defendent in error it would be necessary to insert in the clause in this section limiting the aggregate amount of debt, the word such, so that the existing debt referred to, should mean debt *by loan*. But this would render the provision absurd. The purpose to limit this form of indebtedness to three per centum, having reference to all other forms of indebtedness, is obvious, and yet, the construction contended for would countenance a debt of three per centum by loan; *i. e.*, suppose a city had a debt already of exceeding three per centum not by loan, the construction claimed would authorize a debt of three per centum by loan. Thus the debt by loan would be limited to three per centum, while the debt evidenced or contracted in any other manner would be without any limitation. This construction is inadmissible. It is well settled that when a constitutional limitation of this kind goes into effect, it operates to incapacitate a municipality already indebted to the amount of the limitation, from contracting any further debt. (Wheeler vs. Philadelphia 77 Pa. St. 338; Pike County vs. Rowland 94 Pa. St. 238). If, therefore, the existing debt referred to only meant the same class of debt as that which was being limited, there was no necessity for expressly including it, for it would be by virtue of the limitation, necessarily included. It would, therefore, have

been, had this been the intention, the natural and proper course to expressly say that the debt *by loan*, which could be contracted as aforesaid, should never exceed three per centum. Again, the construction contended for would render the whole phrase—"together with the debt existing at the time of such election," wholly superfluous. Strike out these words and we have a complete and perfect limitation to the intent and purpose that they claim for this section. The clause would then read—"but the aggregate amount of debt so created shall not at any time exceed three per centum of the valuation last aforesaid." Upon every construction which has ever been given a constitutional provision, this last form of expression would include indebtedness of the limited class existing at the time the constitution was adopted, and, therefore, the insertion of the other clause, unless it was intended to include other classes of indebtedness, was wholly unnecessary. We need not cite authority for the proposition that a construction which will render a clause ineffectual for any purpose, will not be readily adopted. We have thus seen that there is a clearly expressed policy to limit the aggregate amount of indebtedness of cities and towns. The general words, "debt existing," clearly include all debts, irrespective of the manner in which they are evidenced, or the purpose for which they are contracted. (Appeal of the City of Erie 91 Pa. St. 398.)

Having ascertained that this principle has been acted upon in respect to the state, and in respect to cities and towns, we should construe the provision in relation to counties in the light of this policy. This is but looking to all the provisions of the constitution to determine what a particular clause means, and this should be done. (People vs. Osborne 7 Colo. 605.) We will now make a more extended analysis of the section in which the disputed clause is contained. The section declares that "no county

shall contract any debt *by loan* in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges." This limitation has respect both to the purpose of the debt and the mode of its contraction. The section then proceeds: "And *such indebtedness* contracted in any *one year* shall not exceed the rates upon the taxable property in such county following." The rates are then specified, by which rates the amount would be three dollars on every thousand dollars valuation in Lake county. This is the amount that may be contracted in this mode, and for these purposes, in one year. This loan may be negotiated every year, provided the former loans have been paid. Then comes the disputed clause. We have quoted it elsewhere. It is claimed that the word "such" should be inserted between the words *all* and *purposes*, so as to make the *aggregate amount* relate only to debts for these special purposes. In determining what this aggregate amount shall be, the clause uses the qualifying expression, "exclusive of *debts* contracted before the adoption of this constitution." To carry out the theory of the counsel for defendant in error, the words "for all such purposes" would have to be inserted in this clause, for it cannot be supposed that if the framers of the constitution considered that they were placing a limitation upon debt for specific purposes only, it was necessary to exclude debts for all other purposes from the calculation. Such debts would be excluded by every rule of interpretation. It is only where an aggregate for *all purposes* is provided for, that existing debts are to be taken into the calculation in determining when the limit is reached. Where the limitation is upon the aggregate for specified purposes, the existing debt for other purposes does not enter into such calculation. The debts excluded must be limited to the class to which the general limitation applied, otherwise the clause would be without effect.

If the word *such* should be inserted by way of amendment, then we suggest that the word *all* should be stricken out as surplusage. The word *such* is entirely sufficient to refer back to the special purposes mentioned in this section; it was used in a great many connections with accuracy; and in this section, where the evident purpose was to speak of an indebtedness which had before been referred to, the expression *such indebtedness* was used. The convention seemed to be about as familiar with the word *such* as the counsel for defendant in error are, and probably knew about as well when it should be used, in order to express their intention, as they can now be told. But wherever this word is used it is never preceded by the word *all*. We, therefore, respectfully suggest that if the court undertakes to amend by inserting the word *such*, the word *all* should be stricken out.

The indebtedness of any county for all purposes shall not at any time exceed twice the amount fixed for the loan in any one year, without a vote of the people. It is said that there is no reason for making the amount of the loan for one year a basis of calculation of the indebtedness of a county at any one time for all purposes. What more reason is there for saying that the aggregate amount of debt for the specified purposes shall only be twice the amount of the loan for these purposes? None whatever. The theory must be, that calculations were made, and reasonable limitations fixed in the mind, in either event, and that the mode of calculation adopted would arrive at these amounts: *i. e.*, suppose the county of Lake was in the mind of the convention, and it is to be supposed that all counties were, a calculation would show that the debt for the special purposes would be three dollars on the thousand; the debt for all purposes would be six dollars on the thousand, and then, by a vote, the debt for all purposes could be increased to twelve dollars on the thousand.

This would be one and one-fifth per centum upon the valuation. This was a convenient mode of expressing these limitations. If the convention desired to make the limitations substantially as these calculations make them, it was much easier for them to arrive at the result in the way they did than to specify each one in full and appropriate language. All such limitations are more or less arbitrary. Having fixed the amount to be borrowed, doubtless by a calculation as to how much it would amount to in the several counties, having reference to the amount of property contained therein, it would be natural enough to arrive at the limitation for all purposes by comparison with that amount, and, that being determined upon, the same process would naturally be employed in fixing the amount which could be added by a vote of the people. It is true that this feature of the provision is anomalous. In all the other states there is no attempt to distinguish between debts *by loan* and debts for *all purposes*. It had not been discovered prior to 1876 that the particular form of indebtedness was material. Before then it was supposed that the debt was the evil, and not the form by which it was evidenced. No one had discovered but that a debt evidenced by a warrant drawing interest was just as burdensome, and would require the same taxation to liquidate it, as though a bond had been issued for it. And no one had apparently considered that it made any difference whether the obligation was entered into directly for some corporate purpose, or whether the money was first borrowed upon the obligation, and then used for the same purpose. There may be some reason for the distinction that was made. There may be some reason fer saying that the borrowing power shall be less than the general power to contract debt. It may have been supposed that if the one extended to the full extent of the other, it might be exercised to the full

extent of the power, and the corporation be thus incapacitated for making the contracts, and incurring the pecuniary obligations, necessary or convenient for the transaction of the corporate business and administering the corporate affairs. If this was the reason, it would be evidence that a limitation for all purposes was intended. While, as we have said, the policy of distinguishing between debt by loan and debt not by loan, is anomalous, the limitation of the contracting of debt by loan, and leaving the power of contraction of debt not by loan without any limitation whatever, would be still more anomalous. It is urged that the clause, "but the bonds, if any be issued therefor, shall not run less than ten years," shows that it was bonded indebtedness only which was in the mind of the convention; but the inference which we draw from this is quite the reverse. The language, "the bonds, if any," clearly shows that the convention understood that they were referring to a class of indebtedness that might or might not be evidenced by bond. This question was raised in the brief of counsel in Prince vs. City (105 Ill. 215), under a constitutional provision, in which the qualifying words "if any" did not appear; but it was not entertained by the court.

The counsel for defendant in error has shown the course of special legislation on the subject of authority for municipalities to incur and fund indebtedness, and concluded that these laws were all continued in force by the schedule of the constitution as not being inconsistent with the constitution. It has been frequently held that the adoption of a constitutional limitation like the one under consideration prohibits the incurring of indebtedness under propositions that have already been voted upon by the people. Unless the contract is executed, the limitation applies, and, if the completion of the enterprise already entered upon necessitates an indebtedness in excess of the

limitation, it cannot be done. (Aspinwall vs. Daviess Co. 22 How. 364; Falconer vs. Buffalo etc. 69 N. Y. 491; State vs. Funding Board 28 La. Ann. 249.) The result is that all this legislation not already acted upon was invalidated by these limiting clauses, and would not have been saved by the schedule, as the schedule only operated to continue such laws as were not inconsistent. To meet the requirements of this situation, section nine of article eleven was inserted. This section provides that "nothing contained in this article shall be so construed as to either impair or add to the obligation of any debt heretofore contracted by any county, city, town or school district, in accordance with the laws of Colorado territory, or prevent the contracting of any debt, or the issuance of bonds therefor, in accordance with said laws, upon any proposition for that purpose which may have been, according to said laws, submitted to a vote of the qualified electors of any county, city, town or school district, before the day on which this constitution takes effect." We read this section as to some extent a construction, on the part of the convention, of a former portion of this article. It seems to assume that certain prohibitions and limitations have been prescribed applicable to any and all debts, and lest they should operate to impair the obligation thereof, and to prevent proceeding under existing laws, in the fulfillment of contracts entered into, or being entered into, under such laws, this saving clause is provided. There is nothing in this section to indicate a consciousness on the part of the convention, that the prohibitions and limitations, the effect of which they were aiming to restrain, were other than general and sweeping in their nature and effect. Of a saving clause in the Illinois constitution, similar to our section nine, the court, in Law vs. People (87 Ill. 385) on page 396, said: "The members of the convention, after using the broad and com-

prehensive language of the first clause of the section, seemed to have supposed that it would prevent the incurring of every species of indebtedness beyond the limit, whether inchoate or completely consummated, hence they excepted from its operation the issuing of bonds that had been legally voted, but not issued, by municipal bodies, to aid in the construction of railroads. Had they not supposed they would be prohibited by the clause, why expressly relieve them from the restriction? The vote to issue such bonds, surely has less resemblance of indebtedness than these certificates. If indebtedness at all, they are but inchoate and incomplete, whilst these certificates have all the forms of legal indebtedness. This lends force to the conclusion that the first clause was intended to embrace indebtedness of every description, nature and kind, and in every sense of the term, whatever the character or form by which it was evidenced, when made or issued, after the limit should be reached."

But it will be said by the counsel on the other side that the amount of debt which a county can contract under our constitution is so small that it is absurd to suppose the convention intended any such result, and that, therefore, the court ought to find some rule of construction by which to avoid such consequences. What is the fact? Is the amount too small? In the first place, it must be observed that this is purely a matter of opinion. There are many who entertain the conviction that municipal corporations should be restrained from the contracting of debt in any form or for any purpose; that such corporations should only be allowed to draw orders on the uncollected taxes already levied for the current fiscal year, simply in anticipation of the collection, and to be paid out of such taxes and in no other way; that any order drawn in any one year in excess of the taxes levied should be void, and the agent of the corporation, thus exceeding

his power and usurping a dangerous authority, should be held guilty of a penal offense. This view very nearly obtained in the constitutional convention of Missouri of 1875. It was there provided that no such corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and then not to exceed in the aggregate, including existing indebtedness, five per centum of the value of the taxable property therein. Under this provision a warrant drawn after the revenue provided for the year had been exhausted would be void. And if at the time of the adoption of the constitution a municipality was indebted to the extent of five per centum, then this provision operated as an absolute prohibition upon the contracting of any debt for any purpose. It is a fact well known by all now, and well known by the convention at the time, that a large portion of the counties and cities of that state had largely exceeded this limit at the time this provision was framed. To all such this constitution was notice that they should "pay as they go." It may be presumed that such a provision would receive ample consideration, and attract much attention on the part of the people of the state, particularly those who were thus indebted, and yet the whole constitution received the unanimous vote of the members of the convention; and, at the polls, comparatively few votes were cast against it. It has not been made apparent, by any effort to change it, that any portion of that state has found this provision otherwise than practical and beneficial. As to the counties and cities so largely indebted, the effect was at once salutary. The public agents, having to keep their expenditures within the revenue of the year, were compelled to act with econ-

omy and circumspection. If the people wished to make any improvement they must first investigate as to their resources. This necessitated an intimate acquaintance with public affairs, and a frequent accounting between the people and their agents. As the money had to be provided for before the expenditure could be incurred, and paid over by the people to the creditor during the fiscal year, both the people and their agents were constrained to proceed with caution in the contraction of obligations. No jobbery and fraud upon the part of agents could go long undetected, and as the people were so soon to be called upon to respond, such crimes were likely to be vigorously prosecuted and punished. The effect was to immediately advance the value of public securities. The first step toward the payment of existing debts is to stop contracting other debts. This was done. Economy and wise management took the place of extravagance and fraud. As to the counties and cities not indebted to the full amount, the limitation stood before them, and practically had the same effect as upon the others. No debt beyond the revenue for the year could be created without a two-thirds vote, and then not to exceed the five per centum. With the experience before the people which dictated this provision, there was little danger of any unworthy object receiving a two-thirds vote, but for fear it might, the five per centum limitation was placed there as another safeguard. Everything which has been here stated as the effect and result of this provision, the court can see are logical results, and may well be presumed to have occurred. In the other states the limitation is generally placed at five per centum, including existing indebtedness. In this state existing indebtedness of counties is excluded. But upon this point there seems to have been an inconsistency. When they came to provide for cities and towns existing indebtedness was in-

cluded. But this apparent inconsistency was partially corrected by placing the aggregate for cities, including existing indebtedness, at three per centum, while the aggregate for counties, excluding the same, was reduced to one and one-fifth per centum.

It will be urged by the counsel for defendant in error that everything was more expensive in this state than in older states; that this fact must have been known to the convention, and that it is therefore absurd to suppose that they intended to place these limitations lower than they had been placed in other states. But the constitution answers this argument. The limitation upon the state is probably the most stringent one in the Union, and the limitation upon cities and towns, including existing indebtedness, was three per centum, while in all the other states it was five or more. Many counties, cities and towns in this state have proceeded upon the bonanza plan, but the convention, in framing a constitution, did not. If, as a matter of fact, it costs more to erect public buildings, to build and repair public roads and bridges, to maintain courts of justice, to suppress riots, to relieve the distressed, etc., than it does in the older states, we must take notice also that the state, at the time of the adoption of the constitution, was sparsely populated, and that, while there were many rich men here, the great majority were in moderate circumstances. Thousands of our voters were living in cabins, and would not have considered favorably a policy of extravagance. It was not expected that we would have court houses, jails, poor houses, etc., such as the counties and cities in the old and wealthy states have. The court below devotes some attention to the strike that occurred in Leadville in 1880, and seems to think that the constitution should be construed in the reflected light of that strike, but it has forgotten that this strike amounted to an insurrection; that it was so treated; that it is the

duty of the state to suppress insurrection, and that, for this purpose, there is no limitation on the amount of debt that may be incurred.

This policy of economy is again illustrated in the provisions applicable to school districts. By sections one and two of article eleven, these districts are, like the state, cities, towns and townships, prohibited from lending or pledging their credit or faith, directly or indirectly, in any manner to or in aid of any person, company or corporation, public or private, for any amount or for any purpose whatever; from becoming responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state, and from making any donation or grant to or in aid of, or becoming a stockholder in any corporation or company, or a joint owner with any person or corporation, otherwise than by operation of law. By section seven of article eleven, it is provided that no debt by loan, in any form, shall be contracted by any school district for the purpose of erecting and furnishing school buidings or purchasing grounds, unless the proposition to create such debt shall first be submitted to such qualified electors of the district as shall have paid a school tax therein in the year next preceding such election, and a majority of those voting thereon shall vote in favor of incurring such debt. The prohibition of debt by loan, without a vote of the people, seems to have been considered sufficient without fixing the limit of such debt. Neither does there seem to be any limitation, other than this, upon indebtedness of a school district contracted in any other manner. If this is the purport of the entire constitution upon this subject, then the public schools would seem to be a favored purpose indeed. Of course, a school district is a municipality organized for school purposes only. It could contract no debt for any other purpose. It is there-

fore reasonable enough, and not materially inconsistent with the general policy of the constitution that, for this special purpose, there should be no express limitation as to the aggregate indebtedness which might be incurred by a school district. The requirement that the debt should be first authorized by a vote of the taxpayers may well have been considered sufficient protection against abuse.

The general purpose of all these limitations is well expressed in the address of the convention, which was addressed to the people, asking their suffrage for the constitution. It says: "By the provisions of this article we have prohibited the legislature from lending the credit of the state in aid of any corporation, either by loan or becoming a subscriber to any stock, or a joint owner with any party, except in case of forfeitures and escheats; also, from assuming any debt or liability of any party, and have also required appropriations to be kept within the limits of our resources, and that no appropriations be made unless assessments are also made sufficient to meet them, and at the same session of the legislature. The same principles are applied to counties, cities, towns and school districts, as far as applicable, with the additional safeguard that, to increase the indebtedness in excess of the rates fixed in this constitution, a vote of the people must be had thereon. *In limiting the amount of indebtedness which may be contracted by counties,* we have endeavored to make a classification that would not cripple counties having small resources, and, at the same time, restricting those of larger resources, *to prevent extravagance.*" We have here (1) a positive declaration that the amount of indebtedness which may be contracted by counties *is limited,* and (2) that this limitation is prescribed *to prevent extravagance.* How does this declaration comport with the proposition that the indebtedness which may be contracted

by counties is limited only when the debt is contracted for certain specified purposes, or when contracted or evidenced in a particular manner? The answer is plain. They cannot be reconciled. There was intended a limitation for all purposes, or the persons who signed this address did not know what was intended. It cannot be supposed that there was any design to deceive the people by this address, and yet, to say, then, that the amount of indebtedness which could be contracted by counties was limited, and to now construe this as meaning that this limitation only applied to a few special objects, would be a contradiction which may be well supposed to operate as such deception. It has been held that this address may be referred to in order to determine the intention of the convention, and the presumed intention of the people in adopting the constitution.

It has been urged that the words of the constitution "for all purposes," would not include the current and necessary expenses of the county, because a county has no purpose in making such expenditure, for the reason that the expenditures are regulated and commanded by law. It is well settled, however, that these words exclude all consideration of the nature of the indebtedness or the reason of its contraction. (City vs. Edwards 84 Ill. 626). In Litchfield vs. Ballou (114 U. S. 190) the court, commenting on this language in the constitution of Illinois, said: "It shall not *become indebted.* Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for *any purpose.* No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount, in relation to the sources of payment, as an impassable obstacle to the creation of any further debt, in any manner or for any purpose whatever. If this prohibition is

worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." The court may very well have added that it makes no difference whether the purpose for which the debt is contracted is one countenanced by law, or even required by law, for the obvious reason that the constitution is as binding upon the legislature as it is upon the counties. The legislature can impose no duty upon a county to violate the constitution. Constitutional regulations and restraints would be of little value if they could be set aside by the authority of one or even all of the departments of state government. There is nothing in these suggestions which merits further consideration.

But it has been urged, also, that a limitation upon the indebtedness of counties for all purposes could not have been intended, because of the facility with which such a provision could be evaded by the collection of an excessive tax. We fail to see how the collection of an excessive tax operates to increase the indebtedness of a county. The fact that burdensome taxation may be imposed, and the further fact that burdensome taxation may have been one of the evils which the constitutional provision was designed to remedy, does not by any means prove that the constitutional provision itself would be either violated or evaded. Burdensome taxation was *one*, but not *all*, of the evils to be remedied. Indeed, when the people of counties and cities are being taxed too heavily for current administrative purposes, the remedy is generally largely in their own hands, but when contracts have been entered into and taxation is demanded to meet public indebtedness, the matter has passed beyond their control. Much of the current expenditure of counties is placed by law, and necessarily so, entirely within the control of the corporate authorities. The theory of the constitution is,

that for all corporate purposes the power to assess and collect taxes must be vested in the corporate authorities. (Const. Art. 10 Sec. 7).

The counsel for defendant in error have discussed what they call repudiation. Whence do they obtain, or find authority for, any such doctrine? No such principle has ever been asserted by any court in this country. In Litchfield vs. Ballou (114 U. S. 190), on page 194, the supreme court of the United States said: "The money rereceived on the bonds having been expended, with other funds raised by taxation, in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received. The holders of the bonds and agents for the city are *particeps criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a policy so strongly declared." In the case from which we have just quoted the city had sold the bonds and invested the money in water works, which were still owned by the city. The city had therefore obtained value received for the bonds, but this was held to make no difference, on the theory that the bonds, being issued in excess of the constitutional limitation, were void; that the agents of the county, and those dealing with them, were violators of the law, equal in guilt; that neither the municipal corporation nor the people thereof, in any legal sense, were parties to the transaction, and that therefore the pretended contract could not be recognized, either in a court of law or equity, for any purpose. The following propositions of law upon this subject have become maxims about which there is no longer any dispute: (1) Municipal corporations have no power except what proceeds

from positive enactment; this applies not only to the means of exercising power, but to the power itself. (2) There is no distinction in reason betweer the cases of entire absence of power, and a prohibition of its exercise. In the first instance power is not granted and does not, therefore, exist; while in the other, it is withheld and its exercise prohibited, and hence does not exist. (3) There cannot, in legal contemplation, be innocent holders of evidences of debt issued in violation of a constitutional limitation, for the reason that every one must take notice of the limitation, and has access to the public records to ascertain when it is being exceeded. (4) The holder of such evidences of indebtedness has no remedy against the corporation. The person receiving and the agent issuing the paper knew of the constitutional limit and are *both violators of the law.* (5) The payee of such paper cannot, by any transfer, convey any greater right than he had. (McPherson vs. Foster 43 Iowa 48; Burrow's Pub. Sec. 488–495.) In view of these principles and these adjudications what becomes of all the talk of counsel about repudiation under the shield of a constitutional provision? There is no repudiation. There is nothing to repudiate. There is no moral question involved in this case. In legal effect we stand upon the plea of *non est factum.* If this is wrong either in morals or in law, let the court declare it so, but, until the court so declares, we will not believe it.

An argument has been presented, to the effect that there has been a legislative exposition of this constitutional provision, and that this construction, though not authoritative upon this court, should be received with great deference and consideration. We deny the fact and dispute the legal proposition. This supposed legislative construction is sought to be deduced from the general legislation, providing that each organized county shall

be a body politic and corporate, and empowered for certain specified purposes. The argument is that for a county to exercise these powers to the fullest extent, might require an expenditure beyond the limitation, and that, therefore, the legislature must have supposed and acted upon the supposition that there was no limit to the debt that might be incurred in the execution of the powers conferred upon a county. One of these powers is to build and keep in repair county buildings. Another is to contract loans in the name and for the benefit of the county, for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, etc. It is admitted that both loans and aggregate expenditures for these purposes are expressly limited by the constitution, and yet no reference to such limitations is anywhere made in this legislation. For all that appears in this legislation, the counties were authorized to contract debt by loan for these purposes to an unlimited amount. Thus we see that by the letter of the statute, the counties were authorized to violate the unquestioned limitations of the constitution. In other words, there was no attempt to make this legislation conform to the constitutional limitations. It is plain that the thought as to whether counties would, or would be required to, exceed any limit, or incur any definite amount of indebtedness, was not present. The fact that in the legislation of the state there is a distinction made between bonded indebtedness and current expenses is without significance. In authorizing taxation, it was necessary to tax sufficiently to pay the principal and interest on bonded indebtedness. This might be more or less, depending on the maturity of the bonds. No special rate could be established for this purpose. But, to meet the ordinary expenditures of the county, a tax of ten mills was authorized. It was argued that this must have contemplated an unlimited

indebtedness, for the reason that the amount of taxes which could be collected was limited, while to carry out the powers of a county might require an unlimited amount of money. It is true that the legislature does not undertake to declare how much money may be expended by a county for all purposes, neither does this body, as we have already seen, undertake to say how much money they may expend for the special purpose for which there is an undisputed limitation fixed by the constitution. The theory on the part of the legislature must necessarily have been that the counties were to take notice of these limitations, and, in the execution of the powers conferred on them by law, keep within such limitations. There is nothing, therefore, in any of the legislation of the state to indicate that the legislature ever considered, discussed or adjudicated upon the question now presented for the decision of this court.

But if there had been any such action on the part of the legislature, we deny that it has any binding force, or furnishes any precedent for this court to refer to, or is entitled to any weight or consideration whatever beyond the reasons or arguments that might appear to be presented by it. Judge Cooley, in discussing the instances in which a department of government or an officer may be called upon, in the performance of an independent power or duty, to construe the constitution, and act upon such construction, says: "For the constitution of a state is higher in authority than any law, direction or order made by any body or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation was made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. But no mode has yet been devised by which

these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practicable only when public or private rights would be affected thereby. They then become the subject of legal controversy; and legal controversies must be settled by the courts. The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative, and sometimes of executive acts. And as judicial tribunals have authority, not only to judge, but also to enforce their judgments, the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid through the enforcement of the paramount law in the controversy which has raised the question." (Cooley Con. Lim. 54). In DeChastellux vs. Fairchild (15 Pa. St. 18) the court said: "It is idle to say that the authority of each branch of the government is defined and limited by the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that the constitution is *thoughtlessly but habitually violated;* and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses to attract their attention. From its very position it is apparent that the conservative power is lodged in the judiciary, which, in the exercise of its undoubted rights, is bound to meet any emergency; else causes would be decided, not only by the legislature, but sometimes without hearing or evidence." In People vs. Draper (15 N. Y. 558) the court said: "Without the limitations and restraints usually found in written constitutions, the government would have no elements of permanence and durability; and the distribution of its powers and the vesting their exercise in separate departments would be an idle ceremony." It needs no argument to show that just in proportion to the extent that the judiciary waives their own judgment and defers to

the construction given a constitutional provision by a legislative body, just in this proportion the two departments of the government are consolidated. In People vs. Wright (6 Colo. 92) the court remarks: "In this case the statute in question is not only a legislative exposition of the amendment, but an exposition by the framers of the amendment, and must, we think, be accepted as conclusive." The constitutional provision in question here was an amendment which had been framed by the same body which construed it. In such case the construction would be entitled to the same consideration as a legislative construction of a legislative act, after giving due weight to the fact that the people who adopted the amendment may have had a different intention from that of the body framing it, and that, in such case, the latter would prevail, if it can be ascertained, and made to harmonize with the language of the provision; but all declarations of the proposition that courts ought to defer to a legislative construction of a constitutional provision which the legislative body had no hand in framing, are, in our judgment, unsound in principle, and would be dangerous in practice.

It will be also urged that this court should not only defer to the construction of the legislature, but should also pay great deference to the construction which has been given by the agents of the several counties who have been violating the constitution. We do not believe that such agents ever thought or cared whether they were violating the constitution or not. Before anything can be claimed as contemporaneous construction it must be shown that the question was considered, and a construction given. It is not enough that acts were done, however numerous, which are in violation of the constitution, when correctly construed. (Cooley Con. Lim. 81–86). And no contemporaneous construction can have weight except as an aid to solve questions

of grave doubt as to the intention with which the provision was adopted. Judge Story says: "Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." (Story Const. Sec. 407). And Judge Cooley says: "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard againt appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, *where it is clear and uniform*, to solve in its own favor the *doubts which arise on reading the instrument* to be construed." (Cooley Con. Lim. 85, 86). It is claimed that several counties in this state have incurred debt beyond this limitation. But is that any evidence that they read this provision, and, by the application of all the technical rules of construction which the learned counsel have employed, came to the conclusion that the framers of the constitution did not mean what they said? And if several counties have violated the constitution, does that show any *clear and uniform contemporaneous construction?* Can this plea amount to anything more than a claim that a wrong has been committed so often that the court ought now to declare it right? We think not, and this plea the courts never allow. Courts have nothing to do with argument *ab inconvenienti* when construing constitutions, and should not "bend the con-

stitution to suit the law of the hour." (Greencastle Township vs. Black 5 Ind. 565).

In the discussion thus far we have had nothing to say about the rules by which constitutions are to be construed. We have undertaken to read the constitution, as it seems to be plainly written, and, when it is thus read, there is no need of rules of construction. When a court is asked to apply such rules, the preliminary inquiry is, as to whether there is any case for construction. Is there here any necessity to go beyond the plain language of the constitution to ascertain the meaning of the clause under consideration? When the constitution declares, "And the *aggregate amount of indebtedness* of any county *for all purposes*, exclusive of debts contracted before the adoption of this constitution, shall not *at any time exceed*" a given amount, is there any necessity to go beyond the language in search of rules by which to construe it? Vattel prescribes this rule: "The first general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it." (Pott. Dwar. 126.) The above maxim has been acted upon by the courts. (Jackson vs. Lewis 17 John. 447; Waterford etc. vs. People 9 Barb. 170; People vs. New York etc. 13 N. Y. 80.) Puffendorf says: "*As for words*, the rule is, unless there be reasonable objections against it, they are to be understood in their proper and most known signification, not so much according to grammar as to the general use of them." (Pott. Dwar. 132.) Grotious says: "In cases that are not *odious*, words are to be understood according to the full propriety of popular use; and if in

popular use there be several significations of the word, the largest is to be taken, as the masculine may be taken for the common gender." (Pott. Dwar. 133.) Rutherford says: "Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation." (Pott. Dwar. 135.) Domat says: "Laws ought to be written, to the end, that the writing may fix the sense of the law, and determine the mind to conceive a just idea of that which is established by the law, and that it be not left free for every one to frame the law as he himself is pleased to understand it. We may, therefore, distinguish two ideas, which the words law and rule form in our minds. One is the idea we conceive to be just, without making any reflection on the terms of the law; the other is the idea of the terms of the law; and, according to this second idea, we give the name of rule or law, to the *expression of the law giver.*" (Pott. Dwar. 137.) The rules which have received the sanction of courts, and become what are known as the American Rules, are to the same effect upon this point as those already cited. (Pott. Dwar. 143.)

In The Wisconsin etc. vs. Taylor County (52 Wis. 37), on page 58, the court says: "We have been urged with great ability to give the section such construction as to forever prevent unjust discrimination by the legislature; and grave consequences have been assumed as the result of a different construction. On the other hand, we have been urged with equal ability that such a decision would unseat many titles, stop revenue, necessitate revision of the laws of taxation, and possibly the calling of a constitutional convention. *The answer to all this is obvious.* It is no part of the duty of the court to make or unmake, but simply to construe this provision of the constitution.

All questions of policy; all questions of restriction and unjust discrimination; all questions of flexibility and adjustibility to meet the varied wants and necessities of the people—must be regarded as having been fully considered and conclusively determined by the adoption of the constitution. *The oath of all is to support it as it is, and not as it might have been.* To do so may, in some cases, lead to individual hardships; *but to do otherwise would be most portentous with evil.*" In Oakley vs. Aspinwall (3 N. Y. 568) the court said: "It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, *under color of construction*, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing as I do that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reasons for latitudinarian constructions which are resorted to for the purposes of acquiring power; some evil to be avoided or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. My rule has been to follow the fundamental law *as it is written*, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by *forced*

and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of government, opens the door for another which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." In Law vs. People (87 Ill. 385), was where the constitutional provision of Illinois upon this subject of limiting municipal indebtedness was under consideration. It is evident that the same line of argument had been made there that the counsel for relator have made here. The changes upon the subjects of repudiation of honest debts, and the hardships to counties and individuals resulting from an enforcement of the constitution, had all been skillfully rung. But the court, on page 395, said: "But, should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and the laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the judge, would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. *Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution*, or the statutes adopted under it, *even to relieve against individual or local hardships.* If unwise or hard in their operation, the power that adopted can repeal or amend,

and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted."

We have now seen that there has been no legislative or contemporaneous construction, and that, if there had been, such construction could not obtain where the language of the constitution is plain and unequivocal. We have also seen that where such language is plain, and, when allowed its natural meaning, leads to nothing absurd or unjust, there is no room for construction. What degree, then, of *absurdity or injustice* must result from giving effect to the plain reading of a constitutional provision, in order to entitle a court to disregard the same, and, by the use of a strained construction and an astute interpretation, arrive at the conclusion that something was intended entirely at variance with the thing expressed? It is an easy matter for counsel, in the argument of a cause, to allege that any result or effect of a law is absurd or works an injustice. A principle of government or political economy that appears to be eminently wise to one man may appear absurd to another. A measure that in the estimation of one person is perfectly just and righteous, will appear to another to be unjust and reprehensible. Many of these questions are mere matters of opinion. It may, to some, appear both absnrd and unjust, that the convention of 1876 should think of limiting the aggregate amount of indebtedness, which a county could contract for all purposes, but to others it would seem unjust and absurd that a convention could fail, in the light of the disastrous experience of the time, to prescribe such limitation. The members of this court might entertain the former view. If, however, it is a question about which men equally honest and equally intelligent might differ, then for the court to set aside the reading of the constitution would be to make, rather than to con-

strue. It would be to substitute the opinion of the court for the opinion of the convention and the people, or, at least, for that which may have been the opinion of the convention and the people. No one will maintain that this is admissible. Then what is the rule? Clearly it must be that to give effect to the letter of the constitution will result in such a degree of injustice and absurdity as not to be imputable to the convention which framed and the people who adopted the instrument. Is this the rule? If so, can any such thing be claimed against this provision?

Upon the first of these questions the court in People vs. Purdy (2 Hill 35) said: "But it is said that we may look beyond the instrument for the purpose of ascertaining the mischief against which the clause was directed, and thus restrict its operation. But who shall tell us what that mischief was? Although most men in public life are old enough to remember the time when the constitution was framed and adopted, they are not agreed concerning the particular evils against which this clause was directed. Some suppose the clause was intended to guard against legislative corruption, and others that it was aimed at monopolies. Some are of the opinion that it only extends to private, without touching public corporations, while others suppose that it only restricts the power of the legislature when creating a single corporation, and not when they are made by the hundred. In this way a solemn instrument—for so I think the constitution should be considered—is made to mean one thing by one man and something else by another, until, in the end, it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to mean more than one thing, unless we lose sight of the instrument itself, and allow ourselves to roam at large in the boundless fields of speculation. *For one I dare*

not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value if their injunctions may be thus lightly overlooked; and the experiment of setting a boundary to power will prove a failure. We are not at liberty to presume that the framers of the constitution, or the people who adopted it, did not understand the force of language." Judge Cooley (Cooley Con. Lim. 87) says: "We have elsewhere expressed the opinion that a statute cannot be declared void on the ground solely that it is repugnant to a supposed general intent or spirit, which it is thought pervades or lies concealed in the constitution, but wholly unexpressed, or because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the constitution confers. *Still less will the injustice of a constitutional provision authorize the courts to disregard it or indirectly annul it by construing it away.* * * * We do not say, however, that if a clause should be found in a constitution *which would appear at first blush to demand a construction leading to monstrous and absurd consequences,* it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments. *When such a case arises it will be time to consider it.*"

Here we have outlined the class of cases in which a court may disregard the letter of a constitution, because to give it effect would work an injustice or an absurdity. The injustice and absurdity must appear at *first blush,* and must be *monstrous,* or, at least, so apparent as to require the condemnation of right-thinking men. Would the enforcement of this provision, according to our construction, lead to any such results? We not only deny this, but we maintain that in its general policy it is one of the

wisest provisions ever devised. As we have seen, the general policy of this limitation has been sanctioned by the constitutions of at least seven states. Mr. Burrows (Burrows' Pub. Sec. 2) says: "The loans made by states, cities and towns, which anticipate the revenues by taxation, have become burdensome to the present generation, and relief has been sought for the future in limitations on the borrowing power. In a large majority of the states of the union, the constitutions have provisions limiting not only the power of municipal corporations, but limiting the legislatures of the states in contracting loans for the state. What are the remedies for this excessive borrowing, is a question for the statesman and the political economist." But, as we have said before, excessive borrowing is but one phase of the real evil. The real evil is running in debt to excess. It is true that some constitutions place limitations upon the borrowing power only, but those are not of recent date. It was found that this remedy was inadequate, and, therefore, in the later constitutions, the limitations have been upon the amount of indebtedness rather than the form of it. In this state, however, both policies were adopted, with a limitation, first, upon the borrowing power, and, second, upon the aggregate indebtedness. We feel confident that there is nothing in this policy, or the manner or extent of its sanction, that this court can pronounce either unjust or absurd. And here we submit the case ought to end.

But we presume we would be scarcely justified in omitting to give some attention to the principles and maxims invoked by the counsel for defendant in error to maintain their position. And before we proceed to answer some of their technical theories in detail, we will quote one authority of general applicability to the whole course of discussion. Judge Cooley (Cooley Con. Lim. 102) says: "We have thus indicated some of the rules which, we

think, are to be observed in the construction of constitutions. It will be perceived that we have not thought it important to quote and to dwell upon those arbitrary rules to which so much attention is sometimes given, and which savor rather of the closet than of practical life. Our observation would lead us to the conclusion that they are more often resorted to as aids in *ingenious attempts* to make the constitution *seem to say what it does not*, than with a view to make that instrument express its real intent. All external aids, and especially all arbitrary rules, applied to instruments of this *popular character*, are of very *uncertain value*, and we do not regard it as out of place to repeat here what we have had occasion already to say in the course of this chapter, that they are to be made use of *with hesitation*, and only with *much circumspection*." It certainly looks very much as though Judge Cooley, when he wrote the above paragraph, had the argument of counsel for defendant in error in this case in his prophetic mind. We do not remember to have ever seen before so bold an attempt to make a constitutional provision, which plainly declares that which is in harmony with the general policy of the whole instrument, and with the prevailing public sentiment of the time when it was adopted, mean an entirely different thing from what it says. All such attempts, however, have heretofore been sternly disallowed by the judiciary. (People vs. Fancher 50 N. Y. 291; Woodson vs. Murdock 22 Wall. 351, 381; State vs. King 44 Mo. 285; St. Louis etc. vs. Clark 53 Mo. 214; Cooley Con. Lim. 68.) A change of this course of decision, made at this time and by this tribunal, would be most portentous with evil. We believe that it would be better for every dollar's worth of property in a state to be annihilated than for this court, under the guise of coustruction, to undertake to strike down a constitutional provision. A city may be laid waste, and the property of a state may

be destroyed, but all this, by well directed endeavor, may be recreated. But the pernicious moral effect of the disregard of the fundamental law of a state by the highest tribunal of a country will go on and on forever. A reversal even of the decision will not repair the injury.

The court is asked to insert the word "such" and dispense with the word "all" in this provision. Of course if a court has authority to insert this word it may also strike it out, and, therefore, all decisions as to whether and when either may be done are in point. In Ogden vs. Glidden (9 Wis. 46), the court, by Dixon, C. J., said: "The word 'such,' in the first line of the second section, must be taken in its ordinary acceptation to mean, 'of that kind,' 'of the like kind,' and to refer to the class of actions specified in the first section. It may be that the failure to extend the provisions of the act to actions pending at the time of its passage was a sort of legislative *casus omissus*, and had their attention been called to it, the legislature would have supplied it; but where, as in this case, the language of the legislature is clear and unequivocal, it is not for the courts to extend the operation of a statute to any subject not embraced in it." Is there any doubt but that this Wisconsin court would have said upon the same principle that they could not, where the language is plain and unequivocal, insert this word in an independent clause, so as to limit, instead of extending, the statute? In State vs. Beaseley (5 Mo. 91), it was held that the word "such," when it is apparent that it has no reference to anything preceding it, may be rejected. This would seem to be a necessary conclusion, but this is no authority for the insertion of the word when the effect would be to make an entirely different law from what it would be without the word. Mr. Dwarris (Pott. Dwar. 218) says: "Though used in their plain and ordinary sense, general words may be limited by the relative

word 'such' to a particular description of thing contained in a preceding section." Limited by whom? Counsel will say, by a court, by way of construction. But the authorities cited show that the author meant that they could be limited by the legislature expressly using the word "such" in the statute. (King vs. Inhabitants of Guenop 3 T. R. 135; Morris vs. Mellin 6 B. & C. 446; Bennett vs. Daniel 10 B. & C. 500; Powlter's Case 11 Coke 33*a*). The authorities cited to this point not only do not sustain the proposition of counsel, but plainly contradict it. In King vs. Marks (3 East 157) the court, by Ellenborough, Ch. J., on page 160, in deciding the very point now made by counsel, but then raised by Erskine, Burrow and Jekyll, said: "If I entertained any reasonable doubt upon the meaning of the act, I should readily listen to this application; but I cannot bring my mind to doubt but that the facts disclosed on the whole of the depositions charge the defendants with an offense within the statute. It certainly does appear from the preamble of the act, as if it were mainly directed against combinations for purposes of mutiny and sedition; but there are words sufficient in the enacting part to satisfy the preamble, and after dealing with offenses of that description, the act goes on in much more extensive terms, and embraces other more general objects; and as there is no word of reference in the latter part, as *such*, which is to be found in the former part of the clause, I see no reason for *restraining the common import of the words used*, which extend to all illegal associations and combinations of men, in respect of which oaths of the nature described in the act are administered." In the same case Grose, J., said: "Then as to whether the offense imputed to these defendants falls within the act in question, it is admitted that the letter of it in the latter part of the enacting clause presses hard upon the case; and

upon a view of the whole statute, I cannot say that it was not meant to extend to an oath taken to conceal the objects and acts of such an illegal combination as this appears to be. No word of reference, as *such*, is to be found in the latter part, in order to connect it with the objects mentioned in the first part of the clause; *and the omission of it shows that it was the intention of the Legislature to extend the objects of the act beyond those before named.*" In Stone vs. Corporation, etc. (2 C. P. Div. 99), Cockburn, C. J., on page 109, said: "Though dealing in this part of the act only with the power of persons under disability to convey the whole estate, the framers of the ninth section have further applied, as it were by anticipation, its provisions to permanent damage or injury to lands held by these parties; such being obviously the meaning of the words 'such lands,' which words, I think, cannot, as has been suggested, be struck out as surplusage, being, on the contrary, words essential to the true meaning of the enactment." There is nothing in the decisions of the courts of England inconsistent with the above cited authorities; on the contrary they have been frequently and pointedly sustained. (King vs. Inhabitants 5 B. & C. 219; Wood vs. Mytton 10 Q. B. 806; Eastern Counties etc. vs. Marriage 9 H. L. Cas. 32; Queen vs. Rose 6 Q. B. 152; Qneen vs. Randall 4 El. & Bl. 564; King vs. Inhabitants 2 B. & C. 222; Doe vs. Hodgson 12 Ad. & El. 135; Skuse vs. Davis 10 Ad. & El. 635; King vs. Burrell 12 Ad. & El. 460; Queen vs. Lee 1 Q. B. Div. 198). By an examination of all of these cases it will be found that the courts of England have given great consideration to the word *such*, holding that a statute means one thing or another, depending on whether the relative word is used or not. And we have not been able to find an instance where such courts have undertaken to insert or strike out this word. The American courts have pursued the

same general course of decision. (Kemp vs. Holland 10 Mo. 255; Sullivan vs. State 36 Ark. 64; Valentine vs. Borden 100 Mass. 273; Summerman vs. Knowles 33 N. J. L. 202; Evans vs. Commonwealth 4 Met. 453; Commonwealth vs. Miller 3 Cush. 243; Commonwealth vs. Hancock etc. 2 Gray 58; United States vs. Gooding 12 Wheat. 460, 477). In Whitford vs. Commonwealth (6 Rand. 721; Same Case, 18 Amer. Dec. 771) the point was raised which is urged here by counsel for defendant in error. This was where a statute declared certain enumerated acts of homicide to be murder in the first degree, and, also, that any other kind of wilful, deliberate and premeditated killing should also be murder in the first degree; and it was argued that the word "such" should be interpolated so that the last description of murder should be of like-kind with the first, on the ground that without such interpolation, the previous particular enumeration was unnecessary; but the court denied the authority to make, and the propriety of making, any such interpolation. And so we say, in conclusion upon this point, that there is no precedent for the interpolation of the word *such* into this constitutional provision. To do so would be not to construe but to proceed in the direction of making a new constitution.

We have now seen that there is no authority of law for inserting the word "such" in this provision, irrespective of the effect that doing so would have upon any other word. We have before stated that the insertion of the word "such" would operate to destroy the effect of the important word "all." This conclusion is indisputable. If the word *such* is inserted, no possible ingenuity can give any effect whatever to the word *all*, and yet this is regarded as one of the most definite, important and technical words known to the English langunge. In Harrington vs. Smith (28 Wis. 43) the court, by Dixon, C. J, on page 60, said: "And here another rule of interpretation becomes

directly applicable, which is, that general words in a statute must receive a general construction, unless there be something in it to restrain them, or, as it is otherwise frequently expressed, if there be no express exception. (Demorest vs. Wynkoop 3 John. Ch. 142; Torrence vs. McDougald 12 Geo. 550; Collins vs. Carman 5 Md. 505, 533). It must be admitted that the word *all*, or the words *all moneys*, are very general, and it is not pretended, nor can it be, that there is anything elsewhere in the statute restraining them, or any express exception. The case in 12 Geo. 530 arose upon the same word *all*, in the statute, and it was held that its application could not be restrained, the statute itself containing no exception. In that case, Lumpkin, J., informs us that the rule was considered so inflexible that the statute of Wills (32 Hen. VIII) having authorized all and every person or persons to devise their lands, it was feared it might enable infants and insane persons to do it; and the statute of 34 Hen. VIII was consequently passed, to introduce these exceptions. (Beckford vs. Wade 17 Ves. 88). And in 5 Md. 505, which was certainly a hard case, and one which appealed most strongly to the sympathy of the court to find its way out of and escape the operation of this rule, it was still held to be inflexible. The question was, upon the right of a widow, who was insane at its date, and so continued, to renounce the provision made for her in the will of her late husband, and to receive her share of his estate as given by law. By the statute of the state it was necessary that she should *dissent* from the provision made in the will, a thing which, being insane, she was incapable of doing. The language of the statute was comprehensive enough to include *every widow*, whether sane or insane, and the statute having made no exception in favor of the latter, it was decided that none could be made by the courts, *whether of law or equity*. It clearly appears to me that, upon these pro-

visions of the statute, and this rule of construction alone, no exception being found in the statute, and no language from which one is fairly or necessarily to be implied, the construction which the statute has received at the hands of the commissioners is the true one, and must stand." In the case of Stone vs. Elliott (11 Ohio St. 252), which is the only case cited by counsel for defendant in error, the rule was invoked under a proceeding similar to a statute providing for the attachment of "all debts," to except from the statute a debt evidenced by a negotiable promissory note, transferred after attachment, but before maturity and without notice, and the decision was based principally on the authority of Kieffer vs. Ehler (18 Pa. St. 388.) The theory of the decision was, that it could not be supposed that the legislature intended to authorize the attachment of a debt evidenced by this kind of commercial paper, in view of the uncertainty of the debt, and the necessity that such paper should circulate freely, and unaffected by secret liens. In the case of commercial paper, the debt is not to the person who may hold the note at the time of attachment, but, by the terms of the paper, it is to the person who holds the same at maturity. After maturity this quality of the paper ceases to exist, and the debt may then be attached. Under all other circumstances the word *all* has been given its literal signification. (Guest vs. Opdyke 31 N. J. L. 552; Latshaw vs. McNees 50 Mo. 381; Algood vs. Blake L. R. 7 Exch. 339; Margrave vs. White 8 B. & C. 412.) In Sidaway vs. Hay (3 B. & C. 12) a similar point to that now presented was raised, and the court said: "The expression here is 'all debts,' and it is used without any reference or regard to the place where the debts may have been contracted. It must be admitted, however, that notwithstanding this generality of expression, it is possible that debts contracted in England may be out of the general operation

and view of the statute, and, therefore, not to be comprehended within the terms 'all debts.' But there is not a single expression in the statute importing that debts contracted in England are to be excluded from its operation; and there are many provisions manifestly showing the contrary." So we say in regard to the constitution, there is not an expression in it indicating an intention that the words "all purposes" should be limited to the special purposes for which money may be borrowed, and there are many expressions and provisions indicating the contrary. If the convention intended the expression to be so limited, the word *all* would not have been used, and the word *such* would have been inserted. The relative word *such*, all through this article, is freely used, and used in every place where it was needed, but it is never preceded by the word all. This gives rise to an inference that is conclusive, that the word *such* was purposely omitted, and the word *all* was inserted in order to execute the intention of placing a general limitation upon all indebtedness for all purposes.

One question that has heretofore been discussed by counsel for defendant in error is not now before the court, and, indeed, has really no bearing on the case. The limiting clause referred to is "but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned." The limiting clause is really the first proposition contained in this quotation, for the latter proposition is a distinct limitation of itself. Now, it is apparent that it is immaterial whether the requirement that the bonds, if any be issued to evidence an indebtedness, shall not run less than ten years, applies only to bonds issued for indebtedness for all purposes outside of debts by loan, or whether it be carried

back and be made applicable to debts by loan, as well as all other debts. It may be that it applies to all cases where bonds are issued by a county, but we doubt it. Whenever money is borrowed by a county, bonds may be issued for it. The power to borrow implies the power to give an obligation for it. But this borrowing power is limited, first, with reference to the year, and, second, with reference to the aggregate, this aggregate of the borrowing power having reference again to the aggregate of debt *for all purposes.* The constitution seems to imply that this power to borrow may be exercised every year, providing these aggregates are not exceeded. This would be inconsistent with the idea that all bonds for money borrowed should run ten years. It was probably the intention to require bonds to run for at least ten years only in regard to the highest limitation of indebtedness, *i. e.*, that debt, and that part of the aggregate debt of a county, which required, as a condition precedent to its contraction, a vote of the people. Such vote is only required when the outstanding debt has reached certain amounts by loan and in the aggregate. In such cases the convention might reasonably suppose that the county would not wish to pay the debt contracted by virtue of this vote in less than ten years, and, therefore, this limiting clause was inserted as a protection against the taxation that would be required to pay this last mentioned debt in less than this time. We are not called upon to express any definite opinion upon this point, or to discuss the authorities upon this rule of construction, for the reason, as before stated, that it is immaterial to the main question at hand.

Neither do we think that the maxim—*Expressio unius est exclusio alterius*—can be employed upon the present occasion with much benefit to either side of the argument. The mention of one thing is never held to exclude another which is also mentioned. And this maxim

is never invoked in the construction of the letter of the statute for the purpose of determining whether both things are mentioned or not. Two things are expressed, first, debt by loan, and, second, debt for all purposes. How can it be said that the mention of one excludes the other? or, how can it be said that the mention of one explains what was meant to be included in the other? There was something meant by the phrase for *all purposes*, beyond what had been expressed in the former limitation of debt by loan. What was it? The maxim under consideration furnishes no reply. This maxim has been frequently considered by the courts (Town of Trinidad vs. Simpson 5 Colo. 65; People vs. Wright 6 Colo. 92), and we do not feel called upon to further discuss it.

By another rule that has been stated and discussed by counsel for defendant in error, a principle of construction is invoked, which principle is frequently stated to be to the effect that where an enumeration of certain specific things is followed by a general word or phrase, the word or phrase of general description is to be deemed intended to mean things of the same kind, and cannot include things of a nature wholly different from those specifically mentioned. We will first notice the cases which have been cited by counsel for defendant in error on this point. In Reiche vs. Smythe (13 Wall. 162) an act levied a duty on horses, cattle, mules, sheep, hogs and other *live animals;* and it was held that birds were not included in the terms *other live animals.* In United States vs. Saunders (22 Wall. 492) the reporter succeeded in discovering in the decision the principle that "A statute is to be interpreted not only by its exact words, but also by its *apparent general purpose.* If its general purpose have plain reference to one class of persons, it will not include a single individual in a distinct class, though the mere words might include him." In Glegary vs. Mayor (13 N.

Y. 220) was where a statute exempted from taxation every building erected for the use of a college, incorporated academy or other seminary of learning, every building for public worship and every school house, etc., and it was held that a *private unincorporated seminary* was not included in the exemption. The English cases cited are somewhat similar in principle to the case of Glegary vs. Mayor, and need not be reviewed at length. We do not wonder that Judge Cooley, in his chapter on the construction of state constitutions (Cooley Con. Lim. 48–103) makes no allusion to this and the other arbitrary rules which are invoked in this case other than to close the same with a solemn admonition against their use. When it is sought to construe a popular and fundamental instrument by the same rules that would be employed to determine whether a bird is a live animal or not, it is certainly time to fear that the rights and liberties of the citizen, which are supposed to be plainly guaranteed by such instruments, rest upon very uncertain ground. The framers of the constitution, having prescribed the amount of debt that could be contracted by a county by a loan, turned their attention to the question of fixing a limitation of the amount of indebtedness for all purposes; but, thanks to the rule *ejusdem generis*, a rule evolved from the closet, and expressed in words which not one out of one hundred of the voters of the state who adopted the constitution, could accurately define, they have failed to accomplish any such purpose. But an examination of the rule will show that it has no application to the question before the court. It simply applies to a case where several things are enumerated and the enumeration is followed by a general word or phrase, by which, whatever belongs within the general word or phrase, is intended to be placed within the same category as the enumerated things. In such case, as the mind of the legislator is supposed to

have been upon a certain class of subjects, the thing comprehended within the general word or phrase is presumed to belong to the same general class as the things enumerated. Now, for this rule to apply, we must have certain things specified. What are these? Are they debts by loan? or, are they debts for buildings, roads and bridges? or, are they debts by loan for these purposes? Upon the same principle that the general clause must be deemed to relate to the specified purposes in the enumeration, it would be also limited to the specified form of indebtedness, so that the only limitation we would have in the constitution would be upon the power to borrow for these specified purposes. But this would prove too much, for it would leave an unlimited power to borrow for all other purposes. This would not do, for the provision declares that no county shall contract a debt by loan, except for the specified purposes. Thus this rule is made to destroy itself. But again, the clause "And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless," etc., is not a word or phrase following an enumeration of things of the same class. It is a separate and distinct proposition. The rule under consideration is never employed to exclude that which is within the general word or phrase, but only to limit to things belonging to the same class as those enumerated. What would be included by the words *all purposes?* Not the enumerated purposes only. That must be admitted. The counsel for defendant in error would be driven to say purposes of the same class as those enumerated. But the enumerated purposes are erecting necessary public buildings, and building roads and bridges. Here are three purposes which cannot be said to belong to any one class. They are distinct in their nature. And nothing else that could

fall under all *purposes* could possibly belong to an enumerated class, for the things enumerated constitute no class. Will it be answered that they must belong to one of the classes of things enumerated? The ready reply is that there is no public purpose corresponding with either of these things in nature, so as to be able to say of it that it belongs to the same class. It would not do to say that debt by loan is the class of things enumerated, and that all debt, to be included in debt for all purposes, must be by loan, for this would prohibit all indebtedness except by loan, so that the constitutional limitation would, at last, be but a requirement that all debts of a county should be contracted by loan—the exact reverse of the policy of the provision. What, then, is to be included by the general word or phrase, for we have seen that this rule never ignores or makes superfluous the general word or phrase, but merely requires it to embrace things of the same kind? The only thing that is specified is debt *by loan for certain purposes in any one year.* If it had been the intention to only prescribe a limit beyond which this debt could not accumulate, it would have been sufficient to use the phrase "and such debt shall not at any time exceed," etc. The three words "and such debt" would take the place of the language "and the aggregate amount of indebtedness for all purposes." Can it be for one moment supposed that a body composed of intelligent men would use a long phrase of this kind as a substitute for the relative *such*? What was the use of talking about the aggregate debt? Here were defined purposes and specified form. To refer back to this particular debt, the word such was sufficient without talking about aggregates. It is said that the expression *aggregate debt* means *aggregate of such debt*, but if this had been the intention, the expression *such debt* would have been complete without the word *aggregate.* But this is a diversion from the point

under consideration. We were proceeding to show that the principle is never used except to ascertain what things not specified can be brought within a general word or phrase following an enumeration. In Commonwealth vs. Rice (9 Met. 253) the question was, whether a box could be used as a mode of occupying a stand at a market where the words of the by-laws were "with cart, wagon, sleigh, or *otherwise*," and it was held that it could. In Ellery vs. The New England Ins. Co. (8 Pick. 14) it was held that damage to a ship by the violence of the wind during an attempt to haul her upon a marine railway to be repaired, was a loss *ejusdem generis* with the perils of the seas and "all other losses to which assurers are liable." A similar point was ruled in Swift vs. Union Mut. Ins. Co. (122 Mass. 573). In regard to this maxim, the court, by Shaw, C. J., in Commonwealth vs. Rice, says: "The maxim is no doubt a sound one, but it is to be applied with discrimination to the subject-matter, with a view to accomplish the purposes of the act." We have searched in vain to find a case in which this maxim has been employed in the construction of a constitutional provision, and we think the class of cases and questions to elucidate which it has been employed forbids its use in the present case.

We have now considered the constitution as it seems to us to be written, and have called attention to the address by which the convention appealed to the people to make it the fundamental law of the state. We have also endeavored to show that the arbitrary rules of construction relied on by the counsel for defendant in error should not be made use of to overthrow the constitution as thus written, and thwart the purpose of the convention and the people. In doing so, we have attempted to show that these rules are either inapplicable to the case or are misapplied by the learned counsel. As to the address referred to, the pro-

ceedings of the convention will show that it was presented to the convention, and, on March 13, 1876, adopted by the convention. (Journal of Convention 831 sub-page 187.) It is well settled that, in case of any doubt as to what the constitution actually means, it is proper to examine the proceedings of the convention which framed the instrument. (Cooley Con. Lim. 80.) These proceedings were, by authority of the convention, published in a daily paper, and transferred to scrap-books for the use of the members. The accuracy with which this was done was recognized by a resolution introduced by Mr. Beck on March 14, which was adopted by the convention. We now turn our attention to the history of the article containing the section in dispute, with the view of ascertaining the intention of the convention concerning the same. On February 1, the convention had under consideration the report of the committee on state, county and municipal indebtedness. Mr. Beck moved that section six, with amendments, be reported back to the convention, with the recommendation that it be recommitted, which was carried. The section, as originally drawn, and as it then was, prescribed no limitation upon the indebtedness of a county *for all purposes.* The clause on the subject of the *aggregate amount of debt* used the word "such," and referred back to bonded indebtedness, but included the existing funded and floating indebtedness of the counties. On February 10, the report of this committee was again before the convention, and considered. Our present section six was section seven of this report. Mr. Head offered an amendment permitting a county or township to contract a debt beyond the limitation for any *incidental expenses,* which was not agreed to. The section was again recommitted to the committee on state, county and municipal indebtedness. Again, on February 21, this section (then

section seven) was considered. The section was read as follows:

Section 7. "No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing of public roads and bridges, and for supplying such county with water for public use; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, to wit:

"Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof.

"Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof.

"And the aggregate amount of indebtedness of any county, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited in case of such county, unless when in manner provided by law, the question of incurring such debt shall be submitted to the vote of the qualified electors of such county at a general election, and a majority of those voting thereon shall vote in favor of incurring such debt, but the bonds, if any be issued for payment thereof, shall not run less than ten, nor more than fifteen years."

Mr. Wells moved to strike out the word "exclusive," and substitute in its place the word "inclusive." Mr. Bromwell said that the word "exclusive" had been used by the committee, because some of the counties, not anticipating such a constitutional provision as this, had already contracted debts to the amount limited, and they should not be prohibited from incurring debts for the construction of public buildings, the securing of a water supply, and *other necessary expenses;* and the amendment

was lost. Mr. Wells then moved to amend by inserting after the word "county" in the second line of the last paragraph, the words "*for all purposes;*" which amendment was adopted. After a number of other amendments not necessary to consider, the section was adopted in committee of the whole. On February 26 the convention took up the report of the committee of the whole on state, county and municipal indebtedness. The section on the subject of counties had now become section six. Mr. Beck moved to strike out the clause empowering counties to contract debts to supply them with water for public use, which was adopted. Mr. Webster moved an amendment confining the limitation of indebtedness, to be incurred by the counties, *to the bonded debt.* He said unless some such provision was adopted, the smaller counties would be unable to *pay for carrying on their regular business, or to meet the extraordinary expenditures that occasionally arise for the capture and trial of criminals.* Mr. Bromwell said all counties were allowed to increase their indebtedness by a popular vote, and Mr. Webster replied that this would not meet *sudden and unexpected emergencies.* Mr. Bromwell said he feared a provision of the kind proposed by the gentleman (Webster) would operate badly in the case of the large counties. He thought the better way to meet the difficulty of the case of the smaller counties would be by an amendment excepting the smaller counties from the operation of the section. Mr. Webster said the smaller counties desired to contract only temporary indebtedness for *current expenditures.* He did not care how closely they were limited in the matter of bonded indebtedness. Mr. Webster's amendment was then adopted, and section six, as amended, was then adopted, but in the afternoon of the same day Mr. Bromwell moved that the vote by which section six was adopted be reconsidered, which motion prevailed. (Journal of

Convention 563.) The vote by which Mr. Webster's amendment was adopted was also reconsidered, and the amendment withdrawn, and an amendment proposed and adopted that the section should not apply to counties having a valuation of less than one million dollars. This completed the section and the article, and they were adopted. (Journal of Convention 564.)

It will be seen from the above sketch from the proceedings of the convention that the present section six of article eleven of the constitution was, as originally reported and adopted, composed of four paragraphs. We shall not stop to answer the proposition of counsel that where there are periods, capital letters and paragraphs used to distinguish between one sentence, one thought and one subject, and another, that these must be wholly disregarded, and the statute read as though none of these punctuations and divisions were used. There are some things that need not be discussed, and this is one of them. In the record of the convention the clause "and the aggregate amount of indebtedness of any county," etc., stood as a separate and distinct paragraph, and enunciated a distinct and independent proposition. The word "such," as contained in the section when referred back to the committee in the first instance, had been stricken out. There was a disposition to still further limit the power to contract debt by including, within the aggregate, *existing indebtedness*. This, however, was voted down, upon the ground that the effect would be an *absolute prohibition* upon such counties as were in debt. This shows that the understanding was that the section then limited indebtedness for all purposes; but, to make assurance doubly sure, the words "for all purposes" were then inserted. But at this stage of the proceeding Mr. Webster, who seems to have been speaking for the smaller counties, had an amendment adopted limiting the limitation to *bonded*

indebtedness. This, however, was reconsidered; and the smaller counties found the desired relief through an amendment, which is the proviso to the section as it now stands.

The amendment of Mr. Webster, by which the limitation of indebtedness of counties was confined to *bonded* indebtedness, was by inserting the word "such" before the word indebtedness. This word was inserted in the forenoon of February 26, and in the afternoon of the same day the word was stricken out by a reconsideration and a withdrawal of the amendment by Mr. Webster. These proceedings will be found fully recorded in the official journal of the convention. (Journal page 558, 562). The section and article were then adopted. Subsequent to these proceedings the article was by mistake printed with the word "such" in this section at the place from which it had been stricken, and the convention took the necessary action to have the mistake corrected. (Journal of Convention 772, Sub. page 28; 827 Sub. page 183; 864 Sub. page 220). Thus we find that the convention discussed and acted upon the very question now before the court. The result is that the court is asked to interpolate into this provision the very word that was inserted by the convention, and that, upon reconsideration and mature reflection, was stricken out. In other words, an appeal is taken from the convention, and the people who adopted the constitution, to this court, for the purpose of undoing that which was done by them. This question was fully argued before, and exhaustively considered and ably adjudicated by, the supreme court of Colorado. (Seeley vs. May 9 Colo. 80.)

III.

Subsequent to the decision just referred to, and as a result of a new and most ingenious discovery, the question

was raised as to whether a distinction could not be made between what has since been denominated *contractual* and *compulsory* obligations. This attempted distinction was repudiated. (Seeley vs. May 9 Colo. 404; Same Case *id* 414). The present action was then instituted and the distinction recognized. The opinion of the court below is contained in the record, and has been reported. (Rollins vs. Lake County 34 Fed. Rep. 845). This pretended distinction proceeds upon the theory that the constitutional provision is not a limitation upon legislative power at all. This would be, if allowed, a convenient, skillful and effectual way of nulifying the constitution. A county is a *quasi* municipal corporation of limited powers. It is a mere local subdivision of the state created for governmental purposes, and has no powers except those conferred by law. (Ray County vs. Bentley 49 Mo. 236.) Notice must be taken of these powers the same as the law of the land. (Mister vs. City of Kansas 18 Mo. App. 217.) If the state has not the power to do an act it cannot impose a duty upon a county to do it. Where the constitution prohibits a state from subscribing to the capital stock of a corporation, or making a donation thereto, it cannot impose a duty upon a county to do so. (Bay City v. State 23 Mich. 504.) And where the debt of a state is limited by the constitution, the state cannot exceed the limitation by imposing indebtedness upon counties. (People vs. Mayor etc. 51 Ill. 34.) *A fortiori*, where the indebtedness of a county is limited the state cannot authorize the limit to be exceeded. As counties can contract no indebtedness without authority of law, it would follow, if this distinction is sustained, that all indebtedness is contracted in pursuance of legislative authority (Seeley vs. May 9 Colo. 404) and therefore no indebtedness which may be contracted by a county is limited by the constitution. This is the logical result of the argument of counsel for defendant

in error. The argument will be advanced by counsel for defendant in error that the legislation which is supposed to authorize this varied indebtedness, is itself authorized by the constitution, and that the powers thus conferred would be hampered, and perhaps defeated, by requiring them to be exercised in subordination to any limitation elsewhere prescribed by the constitution; that for the people to confer general legislative power upon a department of state government, and, at the same time, to require this department to so legislate that counties shall not become indebted beyond a certain amount, is constitutional *felo de se;* that the recognition of the existence of counties and providing them with officers, with such salaries or fees as may be prescribed by law, necessarily implied that the counties should have power to incur indebtedness in order to pay them, and that, therefore, to construe another provision of the constitution as having the effect of placing a limitation upon this power to incur indebtedness for these purposes, would be to introduce a conflict between the several parts of the constitution. The argument assumes that the only resource placed at the disposal of the legislature with which to administer local affairs through the agency of counties, is the power to incur indebtedness. But, as fully shown by the opinion of the court in Seeley vs. May, an unlimited power to raise money by taxation was conferred, so that an unlimited power to incur indebtedness was not essential to the exercise of the powers, and the attainment of all the purposes, of government. No rule of construction is better settled than that a general power must be exercised in subordination to a special limitation of power contained in the same instrument. In Book vs. Earl (87 Mo. 246) the supreme court of Missouri, in construing a similar constitutional provision, said: "The power here conferred is not only hampered

with the condition that such alterations and repairs are only to be made when the funds of the county admit of its being done, but is to be exercised in subordination to the constitution forbidding the making of a debt in excess of the revenues provided for the year." If the plan of the constitution was to administer the government purely upon credit, how and when would any indebtedness be paid? If there is a constantly recurring necessity for incurring debt on the part of counties, it is mathematically certain that their indebtedness must be forever on the increase. A government framed and administered upon this theory would not long endure. It would be entitled to neither the respect nor loyalty of men. But happily neither our national nor state government is framed upon any such theory. Our constitution contemplates that the people of the state shall contribute from time to time, in response to the levy of taxes, for the purposes of government, and that these contributions shall be sufficient, with certain exceptions, to enable the affairs of the state to be properly administered. If the legislature has failed to make appropriate regulations for the complete and harmonious execution of this plan, the judicial power can afford no relief.

The question as to whether a municipal corporation, otherwise liable for negligence, would be exempt from such liability by reason of being indebted to the constitutional limit, is not now involved, but has been resolved in the negative. (The City of Bloomington vs. Perdue 99 Ill. 329.) There is no connection, however, between this proposition and the view that the constitutional provision is not a limitation upon legislative power as well as the voluntary or discretionary action of the county authorities. In Buchanan vs. Litchfield (102 U. S. 278) the court said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction

upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of the prescribed amount. * * No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur." The case of Potter vs. Douglas County (87 Mo. 239) is referred to as establishing a different principle. The court says: "But another reason also occurs why that section cannot apply in the case at bar. The inhibition of the constitution, it will be observed, is leveled against a county becoming indebted: *i. e.* through the ordinary channel, the action of the county court, the financial agent of the county. But here the indebtedness was not so incurred. It was created entirely independent of any action of the county court: created by the sheriff of the county pursuant to the command of section 6090, *supra*. The law itself gave license to the incurring of such a debt; it was incurred by operation of law; and the fact that the county would ultimately have the debt to pay cuts no figure in this discussion." As to this decision we take two positions: (1) That it is erroneous. (2) That the Missouri constitution, upon this point, is entirely different from ours. The constitution of Missouri declares that no county shall "*be allowed* to become indebted in any manner or for any purpose," etc. It shall not do so by its voluntary undertaking, neither shall it *be allowed* to do so by any other power. The convention which framed that constitution evidently had in view the law as repeatedly settled by the supreme court of that state, that counties, in the exercise of their powers and functions, proceed by authority of legislation, and could not incur indebtedness without the authority of legislation, and hence the prohibition was not upon the

counties only, but was also upon the authority by which counties exist and act. Notwithstanding the plain declaration that a county shall not be allowed to become indebted beyond a certain amount, the court declares that a sheriff may, by authority of legislation, do an act by which the county does become indebted beyond this amount. It is difficult to see how there could be a more flagrant disregard of a constitutional provision than this. Under this construction there would be no limit to the amount of debt that might be imposed upon a county. The only restriction would be upon the power of the county commissioners. Any other officer, in the execution of his office, could impose indebtedness without limit. The constitutional provision was intended as a limitation upon the power of the county, and every other power that could act for the county, but the court defeats this purpose.

This decision, however, has no application to our constitution, which provides that "the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed," etc. Under this provision it matters not how or by whose authority the debt is contracted. The plain declaration is that the thing shall not be done. This excludes all consideration of the purpose of the debt or the authority by which it is created. The Illinois constitution is, in this particular, like that of Missouri, and still the doctrine of the Missouri case is clearly repudiated. (City vs. Edwards 84 Ill. 626; Prince vs. City 105 Ill. 215.) The distinction between the Missouri and Colorado constitutions upon this point is material, for, while the language of the Missouri constitution can, with some appearance of reason, be held to refer to the voluntary action of the county, it cannot be contended that the words of ours have any such restricted meaning.

The prohibitory mandate of our constitution is a limitation upon all governmental power, whether legislative, executive or judicial. While we think that the construction of the Missouri constitution which was given in Potter vs. Douglas county is highly erroneous, and that the principle thereof will result, as other cases arise, in involving the court which made it in illogical positions, still we maintain that the distinction between the two constitutions forbids that that decision shall be received as any authority here. The plain and unequivocal language of our constitution leaves no room for doubt, speculation or sophistical reasoning. No more unequivocal proposition can be reduced to writing in the English language, and hence this is an appropriate occasion for the application of the rule against applying rules of construction to language that needs no construction. But let us look at the consequences resulting from the recognition by this court of the principle contended for by the counsel for defendant in error, and see whether or not they would be in harmony with the intention of the framers of the constitution. Why would the convention place a limitation upon the power of the county to create indebtedness, through its own proper agencies, and give to the legislature an unlimited power to incur such indebtedness for counties, or to require the counties to do so? Nearly all the municipal indebtedness that has ever been contracted in this country has been by legislative authority. It has never been claimed that counties had power to pledge their faith or credit to corporations without legislative authority. The convention which framed the constitution did not have unbounded confidence in the legislative body. Many of the limitations of authority are specifically directed against the legislative power. The power of the state, or any municipal corporation, to pledge its credit to a corporation for any purpose, is denied. (Const. Art.

11 Sec. 1.) The power to make any donation or subscription to a corporation is also denied. (*Id.* Sec. 2.) The power of the state to contract debt is limited. (*Id.* Sec. 3.) And such debt can only be contracted by law. (*Id.* Sec. 4.) These prohibitions and limitations are all undoubtedly applicable to the legislative power. Would it be contended that the legislature could authorize *or require* a county to borrow money beyond the limitation of indebtedness by loan prescribed by the constitution, or to contract debt *by loan* for purposes other than those specified? Suppose an act should be passed requiring each county to provide and maintain a poor-house, and, for this purpose, to issue its bonds and place them on the market. Would such an act be valid? The language of the constitution is: "No county shall contract," etc. The counsel for defendant in error would urge that in such case the county does not "contract," but only obeys the law; but it is too plain for argument that a prohibition against the county borrowing money, except for certain purposes, and the limitation of the amount that may be borrowed, is also a prohibition against, and a limitation upon, the power of all agencies which can act for the county. If the legislature contracts the debt for the county, then, in contemplation of law, the county contracts the same, and the fact that any authority acts, in contracting a debt for a county, in pursuance of law, does not render such contract any the less the act of the county. Counties can act only by agents, and any act that binds the county is, in legal effect, the act of the county. If this is a correct view, as applicable to the first clause of section six of article eleven of the constitution, it is clearly correct as applicable to the limitation of the aggregate indebtedness of a county. This latter limitation is general and absolute. One mode is specified by which the amount can be increased. This is not by obtaining permission of the

legislature, but by a vote of the qualified electors who have paid a tax the preceding year. The mention of this manner, in which the indebtedness may be increased, excludes the theory that any other power can authorize the same. The recognition of the broad principle that these limitations do not operate as any restraint upon legislative power, would practically render them of no consequence. The intention of the framers of the constitution would be defeated. The questions as to the policy of these provisions, and the mischief to be remedied by them, have been heretofore discussed, and will not now be reviewed.

But in this Missouri decision the argument *ab inconvenienti* is allowed to furnish another reason for excepting the indebtedness then under consideration from the constitutional limitation, and here another prominent distinction between the constitutions of Missouri and Colorado must be noted. The Missouri constitution not only places a limitation on indebtedness, but also a limitation on taxation, while in Colorado no limitation on taxation is provided. If in the Missouri case there had been no limitation on taxation, the court could have avoided the difficulty upon the view that the legislature could provide additional taxation for all such emergencies; but the power of taxation as well as the power to incur indebtedness had been exhausted. A conclusive answer, therefore, to the Missouri case is that there need never be any occasion for the argument *ab inconvenienti*, because the constitution has vested ample power in the legislature to provide for all emergencies, as was done at the session of 1885. (Session Laws Colo. 1885 p. 318 Sec. 3.) The Missouri decision is also placed upon the ground that the indebtedness could not be foreseen, and therefore could not be provided for by a vote of the people, but there is no force in this, for after the service had been rendered payment therefor could have been assumed by such vote and

the contraction of the debt ratified. It is sought to hold a county liable for a vast amount and variety of indebtedness upon the same principle that a corporation would be liable for a tort, irrespective of the amount of its indebtedness. It may be that under the constitutions of Illinois and Missouri a corporation otherwise liable for a tort, might be liable even though indebted to the constitutional limit, but we doubt whether this could be the case under the Colorado constitution; for it would be difficult, even in respect to a liability for damages for a tort, to avoid the plain declaration that the aggregate indebtedness of a county shall never at any time exceed a certain amount. It could be done only upon the theory that liability for a tort is not strictly a debt. Such liability is not founded in contract. (Louisiana vs. New Orleans 109 U. S. 285).

In the case of Seeley vs. May (9 Colo. 404) the court said: "The phrase 'for all purposes' seems to include debts without regard to the methods of their contraction. The language itself does not discriminate between purposes governing *legislative action*, and purposes controlling the conduct of *county authorities*. It apparently covers every kind of indebtedness, voluntarily authorized or voluntarily contracted. Whether the same be incurred in one way or another, whether created for what may be termed running expenses, or in the consummation of other legitimate objects, the inhibition appears to be equally applicable. The constitutional limitation having been reached, a debt for the statutory fee of an officer, or a statuatory liability in connection with any other municipal employment or expense, is apparently as much inhibited as is indebtedness for labor performed or materials furnished under contract with the commissioners. Such we say is, in our view, the plain import of the language referred to. * * In conclusion upon this branch of the

case, we may inquire, why should the constitutional convention have intentionally left unrestricted the amount of county indebtedness that might arise *by operation of law?* Experience had demonstrated, and the members of the convention knew, that through such an opportunity the wise purpose of the provision would be largely evaded. If there were no control of the legislative discrimination in the passing of laws which might operate to create county indebtedness, it is plain that the great evil under consideration by the convention would be but imperfectly avoided. In view of the language used here as elsewhere in the constitution, we cannot suppose that, while the convention distrusted the wisdom of county authorities in the matter, they had unbounded confidence in the judgement of the legislature. A limitation of county indebtedness, binding upon the legislature, as well as the county authorities, was only a reasonable and a wise precaution." We will now proceed to contrast the position, thus taken by the supreme court of Colorado, with that maintained by the court below in this case.

The first error which we conceive the court below committed was in assuming that it had any power or jurisdiction to overrule the decisions of the supreme court of Colorado. It is alleged in the complaint that subsequent to the registration of the warrants in question the plaintiff bought and purchased the same for a valuable consideration and is now (meaning at the time of the institution of the action) the owner and holder thereof. The pleadings contain no allegation, neither does the proof in the case contain anything, as to *when* the plaintiff's rights, if he has any, accrued. In Burgess vs. Seligman (107 U. S. 33) the court said: "So, when contracts and transactions have been entered into, *and rights have accrued thereon* under a particular state of the decisions, or when there has been no decision of the state tribunals, the

federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts *after such rights have accrued.*" The right to overrule a decision of the supreme court of a state construing a provision of its state constitution is placed by this and other decisions (Bolles vs. Brimfield 120 U. S. 759) on the ground that the right of the non-resident of the state to invoke the judgment of the federal tribunal accrued prior to the decision of the state court. The answer alleges that these warrants were issued to persons who were, both at the time such warrants were issued and at the time of the institution of this action, residents of the state of Colorado and without the right to appeal to the federal tribunals, and this allegation is not denied by the replication. It nowhere appears, either by allegation or proof, but that the plaintiff acquired his alleged rights after these warrants had been declared worthless by the supreme court of the state. The record shows that the complaint in this action was filed on February 1, 1887. The first decision of the state court invalidating these warrants (Seeley vs. May 9 Colo. 80) was filed on March 26, 1886; the second (Seeley vs. May 9 Colo. 404) on December 24, 1886, and the third (Seeley vs. May 9 Colo. 414), rendered on a motion for a rehearing, on January 28, 1887. (Record p. 62, 63). We have seen no decision of any court which gives countenance to the proposition that where securities of this kind are invalidated in the hands of a resident of the state, by a decision of the supreme court of the state, and this upon a construction of a state constitution or statute, a non-resident of the state can subsequently acquire such securities and be entitled to appeal to the federal tribunals to overthrow the decision of the state court. This could not be tolerated except upon the principle announced in Douglas vs. Pike County (101 U. S. 677) and other similar

decisions, and upon the theory that these warrants are *negotiable securities*, to which the rights of all persons in whose hands they ever come, accrue at the date of their issue; and they are certainly not such negotiable securities.

The present orders were made payable to the payee or *bearer*, but we find no authority of law for making them payable to bearer. The statute (Gen. Stat. 1883 Sec. 546) provides that county orders shall be signed by the chairman and attested by the clerk, and shall specify the nature of the claim or service for which they were issued. It is further provided (*Id.* Sec. 556) that every such order shall be numbered, and the date, amount and number of the same, and the *name of the person to whom it is issued*, shall be entered in a book kept by him for that purpose. The order, then, is issued to the person, and he only, whose claim has been allowed. The making the present warrants payable to the person or bearer, was *ultra vires*. In Stodard vs. Benton (6 Colo. 509) it was held that the authority to issue county warrants is a statutory one. The inference would be, that unless the statute authorized the warrant to be made payable to *bearer*, it could not be done. But such orders, in their very nature, even when made payable to bearer, are not negotiable paper. In Jerome vs. Commissioners etc. (4 Colo. L. R. 358) the warrant was made payable to bearer, but it was held that it was not negotiable paper, and that any defense could be made against the holder which could against the payee. In Mayor vs. Ray (19 Wall. 468) the court said: "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer on another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machin-

ery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose." In Wall vs. County (103 U. S. 74) the court said: "The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee. There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere *prima facie* and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims; and when this is conceded the instruments conclude nothing as to other demands between the parties." This decision was affirmed in County vs. Wolcott (103 U. S. 559). In Claiborne Co. vs. Brooks (111 U. S. 400) the court again reviewed this subject and said: "With regard to the political division of counties and townships, we have heretofore, in the cases refered to, expressed our views as to their power of issuing paper obligations of a commercial character. We consider snch a power as entirely foreign to the purposes of their creation, and as never to be conceded except by express legislation, or by necessary, or, at

least, very strong implication from such legislation. The reasons for these views were fully expressed in those cases and need not be repeated. We adhere to them without modification." We do not deem it necessary to review the decisions of the state courts upon this question. They are fully noted by Judge Dillon in his work on Municipal Corporations, and will be found to greatly preponderate in favor of the conclusion that the power to issue such paper is purely statutory; that if the statute (as in this state) authorizes paper to be issued to the person with whom it deals, it cannot be made payable to bearer; that it is not negotiable paper; and that, in any event, any one receiving it, takes it *cum onere* and acquires no greater right than the payee had. Any theory, then, that, as to such paper, there is any absolute contract, or any irrevocable guaranty concerning it, which inheres in the transaction about which it was issued, or adheres to the paper, and passes with it into a subsequent holder's hands, has no foundation in principle, in reason or in the nature of the case. If this is the true nature of such obligations, it logically follows that, to entitle a holder thereof to the independent judgment of the federal court, on the ground of his non-residence, he must *allege and prove* that he acquired his rights prior to the decision of the state court. It would be a very strange and anomalous condition of affairs if operators in this class of securities could litigate the question of their validity in the state courts, and, being defeated there, could transfer them to a non-resident of the state, and then be entitled to an independent construction of the constitution of the state.

Having disposed of the question of jurisdiction, the court below proceeds to say: "In regard to the first, it will be noticed that county indebtedness may arise in one of three ways: It may spring from the voluntary contracts of the county authorities. Second, it may be cast

upon the county by the action of the legislature in requiring the payment by it of certain fees and salaries; and in respect to debts of this class the county as such exercises no choice, has no volition. They are compulsory, as distinguished from contractual, obligations. Further, it may arise from some tortious act of the county authorities. Such a tort creates a liability against the county, which, ripening into a judgment, becomes a debt. Now, in determining when the limit of county indebtedness has been reached, it is obviously immaterial, under said section, how any particular portion of the indebtedness arose, or whence it sprang. It is enough that it is a debt. The language of the section is, 'the aggregate amount of the indebtedness of any county for all purposes shall not exceed,' etc. Every dollar of the indebtedness might have sprang from tortious acts of county officials which, prosecuted by the injured parties in actions *ex delicto*, have ripened into judgments, and thus become debts, and still the limit be reached." A little later on the court undertakes to show, by authority, that liability for torts is not within the constitutional provision. We do not see the force of the reasoning that places such liability without the constitution for the purpose of making the county respond in damages, and then placing it within the constitution for the purpose of determining when the limit of the powers to voluntarily contract indebtedness has been reached. But the vital error of all this reasoning about liability for torts consists in the assumption that counties *may* incur vast liability of this character. By the same course of reasoning it might be concluded that the limitation was not intended as any limitation at all, because liabilities for torts might incapacitate the county for incurring any obligation for any purpose. Constitutions should not be construed in the supposed light of absurd assumptions. Such ridiculous assump-

tions would render all limitations of the power to contract indebtedness on the part of states, counties or cities, wholly impracticable. Limitations of the rates of taxation would fall by the same kind of assumptions. It has been held (People vs. Scott 9 Colo. 422) that the constitution limits the rate of taxation for state purposes, but we presume that the court that rendered the remarkable judgment in this cause would hold that the constitution could not mean any such thing as this, because an irresponsible state treasurer *might* embezzle the funds of the state and then it would be necessary to tax the people double in order to replenish the treasury. The presumption upon which the constitution was framed was, that the people of the state (and they are the same as the people of the several counties) were capable of self government.

It was this kind of a people who undertook to frame for themselves a constitution, and a court has been found to hold that they deliberately placed a limitation upon the indebtedness which *they* could voluntarily contract, through their own immediate agents at home, and for their own immediate purposes, in their respective counties, but did not place any limitation whatever upon the power of the state to heap indebtedness upon them. It might be seriously questioned as to whether a people who would frame a constitution of this kind were capable of self government. There would be more reason, if any distinction is to be made, for saying that they intended the limitation to apply to compulsory and not to contractual, than there is for holding that it applies to contractual and not compulsory, obligations. The argument of the court is based upon the further assumption that the members of the convention distrusted the agents and officers of counties who act at home and with direct reference to their own affairs, and therefore placed a limitation upon their

power to incur indebtedness. This assumption involves the further assumption that the convention had no reason to distrust a legislative body, and therefore no reason to place any limitation upon its power. Any man who knows anything about the annals of this country knows these assumptions to be unfounded; he knows that the great bulk of state, county and municipal indebtedness of the country has been incurred under legislative requirement or sanction, and he knows that it has been one of the great problems that has been before all the constitutional conventions in recent years as to how best to protect the people against the extravagance of legislative bodies acting alike for the state and its subdivisions. We do not know of any other instance, in the entire history of jurisprudence, where any such specious arguments, and unfounded assumptions, have furnished the reasons for disregarding the plain letter of a constitution.

But the entire distinction between *contractual* and *compulsory* obligations is of recent invention, and is altogether too vague and technical to have ever been in the mind of any member of the constitutional convention. It is difficult to say that any of the warrants in question are *compulsory* obligations. The people of the counties compose the state, and the representatives of the counties make the laws. The legislature could require all of these obligations which are said to be compulsory to be paid by the state. The argument of the court assumes that the legislature is a distinct power that arbitrarily imposes certain obligations upon the various counties of the state and wholly without their consent, whereas the fact and true theory of the matter is that the representatives of the counties, in legislative assembly, voluntarily impose these obligations upon themselves. There is no declaration in the constitution as to whether this class of indebtedness shall be paid by the state or by the counties; and in

many of the states very much if not all of such indebtedness is paid by the state. If the counties should refuse to assume this class of obligations where would the state get its laws to impose them or the power to enforce them? It is idle and irrational to argue about a system of state legislation by which compulsory obligations are placed upon counties without and against their consent. If any obligation can be deemed compulsory then all are such. We will illustrate. A statute of the state (Genl. Stat. Sec. 524) provides: "Each organized county shall, *at its own expense*, provide a suitable court house, and a sufficient jail, and other necessary county buildings, and keep them in repair." These county buildings are required to hold state courts and county offices in, and to keep and maintain state prisoners therein. If any obligation which a county can incur, or issue a warrant for, can be deemed compulsory it would be one incurred under this peremptory provision of the law, and yet, to execute this law requires the voluntary action of the county; and the indebtedness that may be incurred therefor is *expressly mentioned* and limited by the constitution. The statute (Genl. Stat. Sec. 538) provides: "The board of county commissioners of each county shall have power at any meeting: * * * to set off, organize and change the boundaries of precincts in their respective counties. * * * To establish one or more voting places in each election precinct, as the convenience of the inhabitants shall require." These precincts are for the purpose of holding elections for both state and county purposes. The statute does not require the board to act, but merely authorizes it to do so, and assumes that it will act voluntarily. Many of the warrants in suit were for expenses incurred by the holding of these elections. Were these obligations contractual or compulsory? The court below assumes, and expressly states, that they were compulsory, notwithstanding the

entire matter was committed to the *discretionary* action of the boards. A statute (Genl. Stat. Sec. 2954) provides: "All public highways, except such as are owned by private corporations, and highways within the corporate limits of any incorporated city or town, *shall be maintained and kept in repair* by the respective counties in which they are located." Here is a *mandatory* provision of the statute and still no one would pretend but that bonds or warrants issued for this purpose would be indebtedness limited by the constitution, for, in fact, it is so expressed; and yet the court below holds that obligations incurred in holding elections are compulsory and without the constitutional limitation. Many of the warrants in suit were issued to justices of the peace and constables for their fees, and yet, as we have seen, the entire subject of establishing, changing and abolishing justice precincts and justice's courts is committed to the voluntary action of the boards of county commissioners (Genl. Stat. Sec. 666), and the allowance of these fees is largely in the discretion of the county board. (Genl. Stat. Sec. 422). A statute (Genl. Stat. Sec. 558) provides: "The boards of county commissioners of the several counties are authorized, when they think the interest of the county requires it, to employ an attorney." This is a matter of discretion, and yet the court below, as a result of the impracticability of the principle it asserts, has entered judgment for a large number of warrants issued to the county attorneys who have been employed, from time to time, by the board of Lake county. Another statute (Genl. Stat. Sec. 2538) provides: "The county commissioners in each county in this state are hereby authorized, *whenever they may deem it proper so to do*, to establish a poor house, and for that purpose to purchase or lease a building upon such terms as they may deem best." The court below has held that liabilities incurred in maintaining the poor, and a poor

house, are compulsory obligations, and has given judgment on warrant numbered 7888, issued to McMillen & Co., for $1,065.96, in payment for "goods for the poor," which, principal and interest, amounted to $1,758.83 at the time of the rendition of the judgment. Other statutes provide that "there shall be established and maintained in each county in this state, at the expense of the county, a county jail," and that "the sheriff of the county in person, or by deputy for that purpose appointed, shall be the keeper of the county jail" * * * and "shall see that the same is kept clean, safe and wholesome; and the expense of keeping the jail in good order and repair, of lighting and warming that part thereof wherein prisoners are confined, and the office in the jail, shall be paid by the county wherein the jail is situated. * * * And it shall be the duty of every such keeper to supply proper food and drink for the prisoners committed to his custody in such jail at his own expense, and the board of county commissioners of the county where such jail is situated shall allow the keeper of the jail for dieting prisoners such reasonable compensation per day as shall be just." (Gent. Stat. Secs. 1814, 1815, 1816). Would obligations incurred for these purposes be *compulsory* or merely *contractual?* The statutory provisions are *mandatory*, but as to the amount the jail shall cost, the salary to be allowed to the keeper, the bills for lighting and warming the jail, and for furnishing food and drink to the prisoners, the law makes no regulation. These matters are all left to the board to regulate and carry into execution under appropriate contracts. If no contract is made in advance there is at the time a claim is allowed and a warrant issued therefor. Indeed, in a general sense, the allowance of a claim and the issuance of a warrant amounts to the making of a contract, and, therefore, all obligations arising upon warrants are contractual in their nature.

(People vs. Hall 8 Colo. 485). A number of the warrants in suit were issued for indebtedness incurred under these last mentioned statutory provisions.

These illustrations could be multiplied, but they are sufficient to show that no obligation incurred by a county is either purely voluntary and contractual or involuntary and compulsory. A county is a mere *quasi* municipal corporation. It has no purely *private* concerns. It can engage in no business, enter into no contracts and incur no obligations except those concerning the administration of public offices; and then only by authority of law. It is a mere creature of the constitution and the statutes. Its interests, duties and functions, are inseparable from, and constantly blended with, those of the state. It is a component part of the state. The counties, together, constitute the state. To say that, as to some matters, the counties are mere machines acting through *compulsion* of the state at large for general purposes, and, as to others, they act as *mere private* and *independent* local corporations, is the height of unreason; and to assume this to be the understood political relations between the state and the counties embraced within it, and that a constitutional convention framed, and the people adopted, a constitution upon such a basis and understanding, is the monumental judicial absurdity of the age. If any such distinction had been intended it would have been carefully expressed. In view of the identity between the functions of the state and the county it would be difficult to frame a constitutional provision that would express the distinction attempted to be made by the court below, but if anything of the kind had been intended an *attempt* would have been made to express it. This was not only not done but the debates and proceedings of the convention demonstrate that a limitation upon legislative power was intended. Before proceeding to notice these debates and

proceedings we will make another quotation from the opinion of the court below. It says: "Will it be said that the legislator can guard against these dangers by an increase of the tax levy? Who shall say how great will be the extravagance of the county officials? or, even if that could be restricted by law, who can foretell how much of crime will happen during any coming year? I am advised by counsel that the suppression of a single riot in Leadville cost the county more than the entire proceeds of that year's levy. These things cannot be foreseen. Can it be that the framers of the constitution intended that compensation for such services should depend upon the question whether a limit of county indebtedness had been reached? It must be borne in mind that the amount of such expenditures can never be foreseen. In one year they may aggregate a great amount, and in the next be comparatively trifling. These considerations of a general nature impress me forcibly with the conviction that it was not the intent of the framers of this section to permit a county to escape from liability on account of such compulsory obligations by the fact that its general limit of indebtedness has been reached. This conviction is strengthened by this provision in the section: that the indebtedness 'shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law the question of incurring such debt shall at a general election be submitted,' etc. Now, what a county proposes voluntarily to do, what amount of debt it proposes voluntarily to create, may be known and submitted to a vote; but who can foresee what amount of crime may be committed, what criminal cases will have to be prosecuted, what expenses must be incurred in such prosecution, or in preserving the public peace, not yet apparently threatened? These are matters which, as they cannot be foreseen, cannot well be provided for by a sub-

mission to popular vote. 'Such debt' is the language; obviously a debt that is contemplated, and not one that may be imagined." Here, then, are fully expressed the considerations upon which the court below disregards the plain and unambiguous language of the constitution. Let us examine these alleged *considerations.*

In the first place these considerations were all before the convention which framed the constitution and were discussed and disposed of. The debates and proceedings of the convention show that Mr. Webster moved an amendment confining the limitation of indebtedness, to be incurred by the counties, *to the bonded debt.* He said unless some such provision was adopted, the smaller counties would be unable to pay for *carrying on their regular business, or to meet the extraordinary expenditures that occasionally arise for the capture and trial of criminals.* Mr. Bromwell said all counties were allowed *to increase their indebtedness by a popular vote,* and Mr. Webster replied that this would not *meet sudden and unexpected emergencies.* Mr. Bromwell said he feared a provision of the kind proposed by the gentleman (Webster) would operate badly in the case of the *large* counties. He thought the better way to meet the difficulty of the case of the *smaller* counties would be by an amendment excepting the smaller counties from the operation of the section. Mr. Webster said the smaller counties desired to contract only temporary indebtedness for *current expenditures.* He did not care how closely they were limited in the matter of bonded indebtedness. Mr. Webster's amendment was then adopted, and section six, as amended, was then adopted, but in the afternoon of the same day Mr. Bromwell moved that the vote by which section six was adopted be reconsidered, which motion prevailed. (Journal of Convention 563.) The vote by which Mr. Webster's amendment was adopted was also reconsidered, and the amendment withdrawn, and an

amendment proposed and adopted that the section should not apply to counties having a valuation of less than one million dollars. This completed the section and the article, and they were adopted. (Journal of Convention 564) The action of the convention upon these motions is shown by the proceedings which are incorporated into the record. As to the discussion of the members of the convention we have to rely upon a record that is not very authentic, but this, such as it is, we will furnish the court; and the court can determine whether judicial notice will be taken of it, and what consideration it is entitled to. The strong contention of the court below is, that no one can foresee the amount of crime that will be committed, and, therefore, it is unreasonable to suppose that the convention undertook to make a limitation of public indebtedness that should include the detection and punishment of crime; and we find that this identical argument was used in support of a motion in the convention confining the limitation to bonded debt. The court below also contends that the clause of the section authorizing the debt to be increased by a popular vote could not be utilized for the same reason—that the amount of crime cannot be foreseen, and we find that this very point was made in the convention, in terms a little more general, when Mr. Webster contended that this clause was not available to meet sudden and *unexpected emergencies.* These arguments and proceedings show that the convention understood that this limitation embraced indebtedness for the *capture and trial of criminals.* But the convention, instead of acceding to these arguments, adopted the policy of excepting the smaller counties from this section of the constitution. To this extent, and to this extent only, they recognized the force of the very arguments now made by the court below. The theory of the convention was that by excepting from the operation of the section the

smaller counties, the indebtedness authorized would be sufficent for *all purposes*—including the capture and trial of criminals and that which might arise from sudden and unforeseen emergencies.

But the theory and assumption that the indebtedness, to be authorized by a popular vote, cannot be utilized for the preservation of the financial ability of counties to meet liabilities for the administration of justice in the courts, for the matter of elections, for the preservation of the public peace, and matters of a kindred nature, is entirely erroneous. This argument is also based upon an assumption that is both *false and absurd.* This assumption is, that counties will, or may, at once incur an indebtedness without a vote of the people that will exhaust their power to contract, and thus incapacitate themselves from administering their *ordinary affairs.* The constitution authorizes a certain amount of indebtedness without, and a certain other amount with, a popular vote. It is not necessary to wait until the power to incur debt without a vote is exhausted before recourse is had to a popular vote. The amount of debt that may be incurred by a vote may be contracted as the first indebtedness of a county, thus leaving the power to contract without a vote in full force. This has been the custom of the state, as shown by its legislation; and this we will show by a single illustration. The constitution expressly authorizes a debt by loan for the purpose of erecting necessary public buildings, and making or repairing public roads and bridges (and these are the only purposes for which money can be borrowed by a county), and yet a statute (Genl. Stat. Sec. 540) provides; "The board of county commissioners shall not borrow money for the purposes hereinbefore stated, without having first submitted the question of such loan to a vote of the electors of the county, and without a majority of the voters legally qualified to vote,

and voting on that question, shall have voted therefor." It is clear and certain that indebtedness thus incurred for these *favored purposes* would not diminish or affect the power to incur the full amount of indebtedness, to meet *current expenses*, that may be incurred without a popular vote. Every fair presumption is that indebtedness will be cautiously and providently incurred, and that the counties will not rashly proceed to *incapacitate* themselves for meeting such emergencies as are likely, though unforeseen, to arise. But this consideration relating to *unforeseen emergencies* is greatly exaggerated by the court below, in view of the further consideration, as heretofore alluded to, that there is no limitation placed by the constitution upon the power of taxation for county purposes, and the legislature can always provide for the levy of an additional and special tax for the purpose of meeting any such emergency; and this has been the policy in this state. (Session Laws 1885 p. 318 Sec. 3.) And emergencies can also be met by drawing warrants expressly on the uncollected revenues of the year, which, it has been held, does not operate to increase the public indebtedness. (Seeley vs. May 9 Colo. 404.) This manner of issuing warrants has been sanctioned by legislation (Session Laws 1887 p. 241 Sec. 2), and this legislation has been approved. (People vs. Austin 17 Pac. Rep. 485; 11 Colo.)

In determining what the intention of the convention and the people was, when prescribing the limitation in question, a general view should be taken of the nature of the indebtedness sought to be excepted therefrom, and the way such indebtedness was viewed and treated under our territorial system prior to, and at the time of, the framing and adoption of the constitution. All of this kind of indebtedness has always been treated, under both the territorial and state governments, as a part of the *current expenses* of the counties. Until the decision of Potter

vs. Douglass (87 Mo. 239) there had been no intimation, on the part of any court, that constitutional limitations similar to the one under consideration did not embrace all indebtedness that could, in any manner, or by any authority, be placed upon a county. These provisions of other constitutions have been frequently considered by the courts, and attempts have been made, but without success, to except from their operation indebtedness incurred for current expenses. In Iowa it has been held that, in determining what the amount of the existing indebtedness is, the outstanding warrant indebtedness must be taken into consideration (Council Bluffs vs. Stewart 51 Iowa 385), and that an evidence of indebtedness, issued after the constitutional limit has been exceeded, is absolutely void. (McPherson vs. Foster 43 Iowa 48.) In Illinois it has been held that the only way in which a warrant can be legally drawn by a municipality that has reached the constitutional limit, is upon the uncollected taxes of the year, and that, unless this is specified in the warrant, it is void (Law vs. People 87 Ill. 385; Fuller vs. City 89 Ill. 282), and that a municipality thus situated can contract no debt for *necessary current expenses.* (Prince vs. City 105 Ill. 138; Same vs. Same *id.* 215; City vs. Edwards 84 Ill. 626.) This provision has also been construed by the supreme court of the United States. (Buchanan vs. Litchfield 102 U. S. 278.) In West Virginia it is held that such a constitutional provision is self-enforcing, and operates to invalidate executory contracts inconsistent therewith made prior to its adoption. (List vs. City 7 W. Va. 501.) It is well settled that a person dealing with a municipal corporation must take notice of this limitation, and of the amount of indebtedness already incurred, and the proportion it bears to the assessed valuation of the taxable property thereof. (Dixon County vs. Field 111 U. S. 83.) The form of the proceeding, by which it is sought to enforce

the contract, is immaterial. The constitutional limitation is as binding upon a court of chancery as a court of law. (Litchfield vs. Ballou 114 U. S. 190.) In Pennsylvania, the constitutional provision has been construed (Wheeler vs. Philadelphia 77 Pa. St. 338; Pike County vs. Rowland 94 Pa. St. 238), and has been held to apply to all indebtedness, irrespective of whether it is bonded or not, or of whether it was contracted by loan or for *current expenses of the county.* (Appeal of the City of Erie 91 Pa. St. 398.) Let us place the clause in question, as contained in our constitution, side by side with that of Illinois:

COLORADO.	ILLINOIS.
"And the *aggregate* amount of indebtedness of any county for *all purposes*, exclusive of debts contracted before the adoption of this constitution, shall not at *any time* exceed," etc.	"No county, etc., shall be allowed to become indebted in *any manner, or for any purpose*, to an amount in the aggregate exceeding," etc.

These are the clauses of these two constitutions which we claim operate to limit the amount of debt which can, *for all purposes*, be lawfully contracted by or for a county. The clauses in all the other states closely resemble that of Illinois. It will be seen that these provisions are framed differently, but they express precisely the same meaning. As to the Illinois provision this court in Buchanan vs. Litchfield (102 U. S. 278) said: "The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount." Is not this purpose just as plainly expressed in the Colorado constitution? And to say that, while the legislative department cannot confer the authority to incur the excessive indebtedness, it may

command it to be done, is to recognize a principle under which the provision of the constitution could and would be entirely evaded and nullified. The legislative body could put every statutory provision, under which a county can incur a debt, in a *mandatory form,* and thereby make obligations incurred thereunder of a compulsory nature. In Litchfield vs. Ballou (114 U. S. 190) this court again considered this provision and held that *if it is worth anything* it is as effectual against an implied as an express promise, and is as binding in a court of chancery as a court of law. And we submit that "if this provision is worth anything" it is as binding upon the legislative department as it is upon the courts and the county authorities.

The judge of the court below concludes his opinion by expressing an apprehension (and one that is well founded) that he may have permitted the high equities of the cause to blind his eye to a clear vision of the literal mandate of the constitution. These supposed equities are exaggerated. Many of the warrants in question were issued for services which the state could have required without compensation. At common law a witness in a criminal case is not entitled to compensation as a condition precedent to attendance. (Whart. Crim. Ev. Secs. 348, 349, 350.) The state can require its citizens to perform many duties and services without compensation (People vs. Roper 35 N. Y. 629) and the duty to aid in the administration of justice, to the extent of giving testimony concerning offenses against the laws, certainly belongs to this class. A violation of the constitution committed by gratuitously rendering compensation for that which can be justly required without compensation cannot be justified by the most liberal application of the argument *ab inconvenienti.* The same thing may be said with reference to the compensation of grand and petit jurors and for the service of con-

stables and sheriffs in state cases. No such person has any higher equity than any one else who performs *honest service* or *furnishes materials* under a *contract* with the board of commissioners. All contracts and obligations give rise to general equities, but there can be no equity paramount to the obligation of a constitution. It was sought to enforce equity, as against a constitutional limitation of indebtedness, in Litchfield vs. Ballou (114 U. S. 190) but this court declared that "the holders of bonds and agents of the city are *particeps criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied *assumpsit* against a *public policy so strongly declared.*" The court below, therefore, erred when it thought that it heard a "voice of appeal" that authorized the blinding of the eye of justice to the *literal mandate* of the constitution. When any court disregards the plain letter of the constitution, and goes out into the realm of speculation and sophistry, it violates every safe rule for the construction of such instruments. When the *argument ab inconvenienti* controls construction, then we can no longer depend upon what a constitution says, for it will be made to mean one thing or another, depending upon the weight that may be given *to extraneous considerations*, about which there will be very little ground for any two men to agree. In reply to all sophistical speculation as to whether the constitution prescribes a limitation upon *all* indebtedness, it is sufficent to say that the instrument *plainly declares it.* We have, in the second subdivision of this brief, called attention to the rules of construction which require this *plain declaration* to be regarded by the judiciary, and will not repeat what has there been stated.

But the court below not only disregarded this plain declaration, but has ignored everything contained in the debates and proceedings of the convention which shows

that this body *intended* precisely what it *said*. We have already called attention to the considerations that the debates show that the convention understood the words "for all purposes" to include all debts contracted for the capture and trial of criminals and those that might result from sudden emergencies; that the constitution plainly limits the indebtedness that may be contracted by the state and by cities and towns—thus making the general policy and spirit of the instrument harmonize with the letter of the clause in question; and that an address which was considered, adopted and promulgated to the people by the convention cannot be reconciled with any theory that no limitation whatever had been placed upon legislative power to incur indebtedness for the several counties to pay. We desire to again draw attention to this address, with reference to which our supreme court, in Seeley vs. May (9 Colo. 80) said: "In an address to the people, issued by the convention upon its adjournment, they make prominent the many provisions of the constitution against *extravagance* in the different departments of the government: in the executive department; in the *legislative* department; and in the matter of *public indebtedness*. This address is an *authentic memorial* of the time, and its value consists, in this case, not only in the *general light* it sheds upon the situation, the direction of the efforts of the members of the convention, and the *mischiefs guarded against*, but in the mention made of the section which we are considering, and the article in which it occurs." The court then quotes from the address and adds: "Attention is here called to county indebtedness in language which points to a *general* limitation of *all* county indebtedness, *irrespective of its form*. Nothing is said of indebtedness *by loan*. On the other hand, the language is in accord with the language used in the section. It also discloses the *legislative motives*. The language is: 'We have en-

deavored to make a classification that would not cripple counties having smaller resources, and at the same time restricting those of larger resources to *prevent extravagance.*' Associated with the intention to prevent extravagance is the desire not to cripple counties having smaller resources. Hence, first the limitation, and then the classification upon the basis of taxable valuation, and the proviso 'that this section shall not apply to counties having a valuation of less than one million of dollars.' We do not care to assign to the language we have quoted any undue value as a specific interpretation of the clauses in controversy. The language may not have been used with care and precision. The presumption that it was so used, however, is strengthened by the fact that the address was first prepared by a committee, among whom were able lawyers and jurists, and afterwards submitted to, considered and adopted by, the convention. It has the rank and character of a *state paper* issued to the people by their chosen representatives in convention assembled at a most important period in their history, and upon questions of the first magnitude. Whatever its force, it supports the construction given. What we submit as unquestionable is this: that it discloses clearly an intention upon the part of the framers of the constitution to guard against *extravagance in the matter of county indebtedness.*" Up to this time there had been no suggestion by the learned counsel in this cause that if this limitation was not confined to indebtedness contracted *by loan*, it did not include that contracted by operation of law. This latter theory was subsequently evolved from the closet by the ingenious counsel and based upon the Missouri judicial monstrosity. Every argument that has or can be adduced against confining this limitation to debts contracted *by loan*, applies, with equal or greater force, against the position that there is no limitation whatever upon legislative power respect-

ing county indebtedness. The convention in this address, declares: "*The end sought to be accomplished was to secure a just and economical administration of the departments of state,*" and that "*the same principles are applied to counties, cities, towns and school districts, as far as applicable, with the additional safeguard that to increase the indebtedness in excess of the rates fixed in this constitution a vote of the people must be had thereon.*" Here is a plain and unequivocal declaration that the indebtedness of counties is "*fixed in this constitution,*" and that the same can be increased, not by *legislative action*, but only by a vote of the people. In connection with the above and other similar declarations, the convention, in this address, and by way of urging upon the people the adoption of the constitution, about which that body evidently had grave apprehensions, said: "But is easy to foresee that, from different causes, and from different sources, an effort will be made, and many artifices employed, to weaken in your minds the conviction of this truth, and we may reasonably assume that the chief objection made to a state government will not be founded upon the character ot the instrument we have framed, but upon the alleged and supposed *increase of expenses and consequent taxation.* This is the old cry, and, however potent it may have been heretofore, it certainly has lost its force in the facts of the present." If this declaration had been accompanied with a statement that, while the indebtedness that could be incurred by and through the voluntary action of the county authorities had been limited, there was no limitation upon the legislative power to create obligations to be paid by the people of the counties, any one who knows anything about the annals of the time, knows that this constitution would have been *doomed;* and this condition of public sentiment can be fairly inferred from this address. What difference does it make to a people as to whether a debt

to be paid by them is imposed by legislative action or by action of their county commissioners? The indebtedness and *consequent taxation* was the evil and burden to be guarded against, while the *form* of it, and the manner or authority by which the same should be incurred, were wholly immaterial. "What difference does it make to the overtaxed citizen whether the debt his property is confiscated to pay is called floating or bonded?" (Appeal of the City of Erie 91 Pa. St. 398.) And what difference does it make by whom the same is incurred? It is too plain for serious discussion that this constitutional provision, as expounded to the people by the convention, was either a *general* limitation or a *delusion and a fraud.* And if this constitutional provision means what it says, and what we claim for it, then we deny that any court, however learned and august it may be, has any moral or legal right, under the guise of construction, to overthrow it; and to do so is to violate the principle of free government in one of the states of the union. This, we are assured, will not be done or tolerated by this tribunal, for it has frequently declared that where a question of the construction of a state constitution, given by the highest judicial tribunal of the state, is *balanced with doubt*, the construction of the state court will be followed. If there can be any doubt but that the construction given by the court below is erroneous, can it possibly be said that the question is not *balanced with doubt*, and that, after giving the decision of the state court due consideration, and leaning in the direction of avoiding an *unseemly conflict*, it is the duty of this tribunal to overrule the state court?

Let us take a little further view of the occasion of the adoption of our constitution. In Rhode Island vs. Massachusetts (12 Pet. 657) this court said: "In the construction of the constitution we must look to the *history of the times* and examine the state of things existing when it

was framed and adopted, to ascertain the old law, the mischief and the remedy." In Ogden vs. Saunders (12 Wheat. 213) this court said: "We cannot look back to the *history of the times* when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes *home to every man*, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess *by the state legislatures*, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to *sap the morals* of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from the reform of government." Let us apply this reasoning to the case in hand. In considering the history of the times we need not go beyond the records of of the federal judicial tribunals. Prior to 1876 the counties in Kansas, Missouri and other sister states, had become indebted, by bonds and warrants, to an amount that was not only *excessive but truly alarming;* and the consequences of this improvidence and extravagance were just then coming "home to every man." In 1876 the courts of several of these states were flooded with actions to en-

force this indebtedness. Boards of county commissioners were being pursued by mandamus proceedings to compel them to levy taxes to pay judgments had upon these bonds and warrants; and, in some instances, were being attached and imprisoned for failure or refusal to obey appropriate writs. As to the history of the time at which this convention assembled the court in Seeley vs. May (9 Colo. 80) said: "The waste, extravagance, frauds, peculations, defalcations and tax burdens disgracing and incumbering the administration of American municipalities, county, town and city, had long been national topics of discussion, written about by publicists, denounced by the press and resolved about by political parties, and were known to the country at large. The effect of this was to make the honest and economical administration of affairs, whether town, city, county or state, practically the most important question that came before the convention." What, then, was the real mischief, as disclosed by this *history of the times*, that the convention sought to remedy? It was *excessive public indebtedness.*

The first provision made in the direction of furnishing a remedy for this evil, is as follows: "Neither the state, nor any county, city, town, township or school district, *shall lend or pledge the credit or faith thereof*, directly or indirectly, in any manner to or in aid of any person, company or corporation, public or private, for any amount or for *any purpose* whatever, or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state." (Const. Art. 11 Sec. 1.) What was the purpose of this *absolute prohibition?* It was not altogether to guard against mere *extravagance.* This could have been accomplished by regulating the manner in which these prohibited engagements should be entered into. The purpose was to prevent public indebtedness. Now, will it be said that this

prohibition goes only to the voluntary action of the counties, and that the legislature can, by operation of law, impose liabilities upon the counties for these purposes? Suppose the legislature, in the belief that it is for the good of the state, should pass an act *requiring* all counties through which a railroad should be built, to issue its bonds or warrants (either as a gift, loan or subscription) to the company building the road, for a certain amount, or for an amount proportionate to the taxable property of the counties, would any one maintain that such act would be valid? But if not, why not? It could be urged that, in such case, the county does not do the prohibited act, but only assumes an obligation placed upon it by *operation of law.* If there is any reason in this alleged distinction between contractual and compulsory obligations, why not employ it for the purpose of construing away *this*, as well as any other provision of the constitution? It is true that it plainly appears that the convention intended to place a prohibition upon the state, as well as the counties, with reference to the indebtedness in question, but it is equally plain that the constitution intended a limitation upon the general indebtedness of the state, so that this consideration would have to be, in the interest of the distinction in question, brushed aside; and an attempt to do so would be but the *reductio ad absurdum* of the reasoning of the court below. The next section (Const. Art. 11 Sec. 2) contains a further absolute prohibition upon both the state and counties. Then follows, in separate sections, the limitations upon the indebtedness of the state, counties and cities. The entire article upon public indebtedness, when analyzed and considered as a whole, shows an intention, first, to absolutely prohibit public indebtedness for certain purposes; second, to prohibit the borrowing of money, except to a certain amount, and for certain favored purposes, and, third, to limit public indebtedness (whether

state, county or municipal) *for all purposes.* It would be only through legislative action that the state could become indebted, and it is therefore evident that it was no part of the intention of the convention to repose unlimited confidence in the legislative department. If such confidence could not be placed in this department, with reference to state indebtedness, why should it with reference to county indebtedness? When the general policy, spirit, purpose and scope of all the provisions of the constitution upon the sujbect of public indebtedness are carefully considered and compared, it will be found that to recognize the distinction made by the court below is to create an anomaly, and to place a blemish upon the entire instrument. No one has pretended, or can pretend, but that the language of the constitution as plainly and literally embraces what are called debts by operation of law, as it does those arising upon express contract; so that, to allow this distinction, not only requires that the general policy and spirit of the constitution shall be disregarded, but that a class of indebtedness shall be excepted from the operation of a provision that *plainly embraces it.* We submit that to do this is quite beyond the province of construction. (French vs. Spencer 21 How. 228; Yterbide vs. United States 22 How. 290; Hadden vs. Barney 5 Wall. 107; Thornley vs. United States 113 U. S. 310; Poor vs. Considine 6 Wall. 458.) The court below rendered its decision apparently without any regard or reference to the actual and literal meaning of the language employed by the convention in framing this provision. This was gross error. In French vs. Spencer (21 How. 228) this court, speaking of a mere legislative enactment, about which there is more latitude for construction than there is in the case of a constitutional provision, said: "It is *plain on its face* and *single in its purpose.* And, then, what is the rule? One that cannot be departed from without assuming on the part of the

judicial tribunals *legislative power.* It is, that where the legislature makes a plain provision, without making any exception, the courts can make none." In Thornley vs. United States (113 U. S. 310) it was said: "Where the meaning of a statute is *plain*, it is the duty of the courts to enforce it according to its *obvious terms.* In such a case there is no necessity for construction." It is not necessary to multiply authorities upon this question. Applying those just cited to the constitutional provision under consideration, we maintain that such provision is plain on its face and single in its purpose, and that the decision of the court below involved a *usurpation* of the power of the people of Colorado to frame their constitution; and that, to effectuate this usurpation, a distinction has been drawn that is artificial and impracticable.

The judge of the court below, in his opinion, says: "I believe that it is agreed between counsel that the warrants sued on in this action are of *this nature*, and the judgment must be entered, therefore, in favor of the plaintiff." The opinion was given upon an agreed statement of facts. There is nothing in such agreed statement that justifies any such conclusion. The complaint, instead of counting separately upon each warrant, after making some general allegations, alleges "that among said warrants were the following warrants, that is to say, warrants numbered as hereinafter set forth, bearing date as herein specified, and to the persons as herein named, *for the purposes as herein set forth* and of the amount as herein stated." Then follows, in the body of the complaint, a schedule of the warrants upon which the action is based. If it should be conceded that this allegation is not denied, then it would be admitted, but nothing would be admitted beyond what is alleged. Nothing appears respecting the purpose for which the warrants in suit were issued, either in the pleadings or proofs, other than that which is con-

tained in this schedule. No attempt was made, upon the hearing of the cause, to test these warrants by the absurd distinction drawn by the court. The agreed statement of facts was, of course, prepared before the opinion was rendered. The entire document was prepared with reference to the question as to whether the constitutional limitation was confined to indebtednes *by loan* or applied to indebtedness *for all purposes.* No one dreamed that if this limitation could not be confined to debts by loan, that a great mass of indebtedness could be excepted from the otherwise perfectly unequivocal terms of the constitution; and, hence, no proof or argument was directed to any question as to whether the warrants in suit had been issued for contractual or so called compulsory obligations. Unless, then, this finding and judgment are authorized by the complaint, they are without any foundation. We will not discuss, in detail, the purposes for which these warrants were issued, as stated in the complaint. It is sufficient to say that if anything that a board of county commissioners can do is discretionary and voluntary, then a large number of these warrants, as shown by the legislation heretofore referred to, are for what the court calls *contractual* obligations. It follows that, even if this court should reach the same conclusion as the court below with reference to the principal questions involved, the judgment must be reversed, to the end that a calculation may be made in accordance with such conclusion; but we regard the reaching of such a conclusion by this court as something beyond the range of legal possibility. In conclusion we ask the court to let the constitution of Colorado *stand as it is written.* The people of this state have *plainly and emphatically* declared that there shall be a limitation upon the indebtedness of counties for all purposes, and *vox populi, vox Dei.*

DANIEL E. PARKS and
H. B. JOHNSON,
Attorneys for Plaintiff in Error.

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In the Supreme Court

Of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO,
Plaintiff in Error,
vs.
FRANK W. ROLLINS,
Defendant in Error.

No 1347

ARGUMENT FOR DEFENDANT IN ERROR.

WILLARD TELLER,
Attorney for Defendant in Error.

WHIPPLE & PIERSON, LEGAL PRINTERS, DENVER, COLO.

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Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR.

The general statement of facts submitted by counsel for plaintiff in error, upon which judgment was had in the Court below, is, we think, sufficient for the purposes of this argument. By reference thereto it will be seen that the case is one by no means unusual, that of *debt* incurred under well established rules of law, in carrying on the ordinary business of a county, which, long years after its incurment, the county seeks to repudiate, on the sole and only ground that, when incurred, or, as it is put by plaintiff in error, "attempted to be incurred," the county was indebted to the full amount to which it could become in-

debted, by reason of a constitutional limitation, to wit: Sec. 6 of Article 11, Constitution of the State of Colorado. By further reference to the record it will be seen that the cause was submitted to the Court without the intervention of a jury, on stipulation to that effect, and heard upon evidence stated and set forth in bill of exceptions, as "a statement, agreement and admission of facts, in writing in *hæc verba*." There is nothing in the record to show whether such statement was, or was not, all the evidence offered or received, the only reference to the evidence, and what it was, being found at page 54 of the record, the statement itself being as follows: "It is hereby stipulated that the facts relating to this action are as follows, to wit." But it is nowhere stated that those were all the facts, or that the case was to be heard, or was heard, upon those facts alone.

In such a state of the record as to facts, upon which judgment was rendered, it is clear that plaintiff's point, *first* raised in *this* Court, is not well taken, since the record fails to show anything as to what evidence was offered as to ownership of the warrants, and it does not pretend to give *all* the evidence, and in such case the presumption of correctness of the finding and judgment cannot be assailed without an affirmative showing of what the evidence, and the whole of the evidence, was, and the rule in this respect is the same as it is in considering the correctness of instructions given, where such correctness depends upon the evidence.

Wiggins vs. Burkham, 10 Wall., 129.

There being no special finding as to the facts in this case by the Circuit Court, this Court, sitting as a Court of error, cannot pass upon the sufficiency of the evidence, or upon its weight, much less can it determine the evidence

insufficient when the record is silent as to how much or what the whole of the evidence was.

Diest vs. Morris, 14 Wall., 484.
Hyde vs. Booraem, 16 Pet., 169.

It is only when the finding is special that this Court will review the facts and their sufficiency to support the finding.

U. S. Rev. Stat., Sec. 700.
Dickinson vs. Planters' Bank, 16 Wall., 257.
Ins. Co. vs. Folsom, 18 Wall., 248.
Cooper vs. Omohundro, 19 Wall., 65.

So, too, if it had appeared, by a special finding even, that no proof of ownership or endorsement was given at trial, the fact that no objection to such want of proof was made at that time, when it could have been met, will prevent its being made here.

O'Reilly vs. Campbell, 116 U. S., 418.

Nor is a county warrant included within the terms of our statute (R. S. Colo., 103 and 104), since they are *not* instruments made by any person, whereby such person promies or agrees to pay, and when payable, as in this case, to bearer, they pass by delivery without endorsement.

1 Dillon's Municipal Corporation, Sec. 487.
Jerome vs. Rio Grande Co., 5 McCrary, 641.
Thompson vs. Perrine, 106 U. S., 589.

This, then, is all that need be said as to counsel's first objection, *in arguendo*, to the judgment in this cause, and we now call attention to what we might well have noticed first, since it goes to the whole case of plaintiff in error, and that is, that *on the record presented, this Court will affirm the judgment of the Court below without reviewing the merits.*

First.— As has already been said, the trial having been had by the Court, and the finding being general, not special, and the only exception taken at the trial being an exception to the finding (see Record p. 54), this Court must affirm the judgment, since the exception to the finding does not necessarily or even apparently on the record, raise any question of law that this Court will pass upon. For aught that appears in the record, the exception in the finding may as well be upon some supposed lack of proof or insufficiency of the facts in the case, as an exception to the law. Indeed it is clear from the argument of counsel for plaintiff in error, that they do except to the finding on that ground, since the first point mentioned in their argument is one that goes to the insufficiency of the evidence, as to endorsement of the warrants sued on.

On a general finding of this character, the Court does not concern itself with questions of fact, the finding is equivalent to the verdict of a jury and the Court will not review the facts.

Ziller vs. Eckert, 4 How. 297.
Hyde vs. Stone, 20 How. 170.
U. S. Ex. Co. vs. Ware, 20 Wall. 543.
Chicago & N. W. R. R. vs. Ohle, 117 U. S. 123.
Rep. R. B. vs. K. P. R. Co., 92 U. S. 315.

A general finding, like a general verdict, may, and it generally does include both facts and mixed questions of law and fact, and is conclusive upon both, unless exception has been taken at the trial to some question of law.

Norris vs. Jackson, 9 Wall. 127.

In this case the Court said: "Whether the finding be general or special, it shall have the same effect as the verdict of a jury * * *. In the case of a general verdict, which includes or may include, and generally does,

mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the Court on the law. In case of special verdicts, the question is presented as it would be if tried by a jury, whether the facts there found require a judgment for plaintiff or defendant, and this being matter of law, the ruling of the Court on it can be reviewed in this Court on that record. If there were such a special verdict here we could examine its sufficiency to sustain the judgment, but there is none. The bill of exceptions, while professing to detail all the evidence, is no special finding of the fact. The judgment of the Court must then be affirmed, unless the bill of exceptions presents some erroneous ruling of the Court *in the progress of the trial.*"

And the Court, further in that case, sums up and condenses the rules as to the mode in which cases tried by the Court, are reversible in this Court, as derived from the case of Insurance Co. vs. Tweed, 7 Wall. 44, and says: "If the verdict be a general verdict, only such rulings of the Court, *in the progress of the trial*, can be reviewed as are presented by a bill of exceptions, or as may arise on the pleadings."

Second.—"In such a case the bill of exceptions can not be used to bring up the whole testimony for review any more than in a trial by jury."

Third.—"That if the parties desire a review of the law involved in the case, they must either get the Court to find a special verdict, which raises the legal proposition, or they must present to the Court the propositions of law and require the Court to rule on them."

Fourth.—"That objections to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of excep-

tions." This ruling, thus announced, has been steadily adhered to by this Court ever since.

Miller vs. Life Ins. Co., 12 Wall., 300.
Cooper vs. Omohundro, 19 Wall., 65.
Tyng vs. Grinnell, 92 U. S., 469.
Rep. R. B. vs. K. R. R., 92 U. S., 315.
Otoe Co. vs. Baldwin, 111 U. S., 17.
Martinton vs. Fairbank, 112 U. S., 670.
Santa Anna vs. Frank, 113 U. S., 339.

Invoking, then, this rule of this Court, we respectfully submit the judgment in this case should be affirmed without reviewing the merits.

II.

But, if we are wrong in this, we submit herewith our reasons for the faith that is in us that this Court will, upon a review of the facts and the law, affirm the judgment of the Court below.

The contention of plaintiff in error is that Sec. 6 of Art. 11, Constitution of Colorado, is a limitation upon Counties of all and every kind of indebtedness, no matter for what or in what manner it be incurred. The contention of defendant in error is, that it is a limitation, first, to debts incurred "by loan," and, second and further, such debts by loan are limited to debts contracted for two purposes only, viz., erecting public buildings and making and repairing roads and bridges, and, third, the limitation is to debts contracted in any one year, and, fourth, to an aggregate indebtedness for any number of years. It reads:

"No County shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall

not exceed the rates upon the taxable property in such County following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness for any County for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such County as in the year last preceding such election shall have paid a tax upon property assessed to them in such County, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debts so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided, that this section shall not apply to Counties having a valuation of less than one million of dollars."

Which of these contentions is correct depends upon a construction of this section, and this construction, like all constructions of similar instruments, must be had in the light of surrounding circumstances under which the instrument was adopted, as well as with reference to other provisions of the same instrument, and such construction must be had as will, if possible, avoid all conflicts between it and other sections of the same instrument, so that each and every section thereof may be made operative and effectual to secure the ends intended by such instrument. In thus construing a Constitution the rules of construction are the same as those applied to statutes, except that

State Constitutions are not grants of power but a limitation upon pre-existing power; and to these general propositions we need cite no authority.

From this it follows that all bodies recognized by the Constitution as having plenary powers in any direction will be limited as to those powers only by express or implied constitutional limitations, and to authorize an *implied* limitation, the implication must be a *necessary* one.

People vs. Rucker, 5 Colo., 455.
People vs. Wright, 6 Colo., 92.
Alexander vs. People, 7 Colo., 155.

2. That in construing this section, Courts must construe it to be a limitation of the powers of the Legislature and Counties, only when the limitation is expressed or implied, since both these bodies are constituent parts of the State government and are especially referred to and recognized in the Constitution itself, and existing before the Constitution.

Art. 5, Sec. 1, *et seq.*
Art. 14, Sec. 1, *et seq.*

3. That since the Counties are constituent parts of the State government, necessary to effectuate the political organization and administration of the State government, neither the laws of the State or its Constitution should be interpreted so as to impair, much less to deprive them of power to effectuate the ends of County being.

Cooley's Con. Lim., 240 (5th ed.).
1 Dillon, M. C., Sec. 23.
Hamilton vs. Mighels, 7 O. St., 109.
Talbot vs. Queen Anns Co., 50 Md., 245.
State vs. St. Louis, 34 Mo., 570.
R'y Co. vs. Bently, 49 Mo., 236.

Counties "are certain portions of territory into which the State is divided, clothed with certain defined powers, to enable them to perform those public duties, which, according to the laws and usages of the State are always intrusted to local interests. They form together one political body in which the sovereignty resides."

State of Md. vs. B. & O. R. R., 3 How., 550, 551.

By reference to the Constitution of Colorado, article 14, it will be seen, 1st, that counties were recognized as existing before the Constitution itself; 2d, that their further existence, and the inviolability of the location of county seats and the territory was secured, except as otherwise provided; and 3d, provision made for some county officers therein named, and a duty imposed on the Legislature (Sec. 12) to provide for the election of such "*other* county officers as public convenience may require"; and 4th, a duty imposed on the Legislature (Sec 15) to classify the counties and to grade and *fix the compensation* of county officers—both fees and salaries; and also, (Sec. 7) that "the compensation of all County and Precinct officers *shall be as provided by law.*" The officers thus specially mentioned n that Article are County Commisioners, County Clerk, Treasurer, County Superintendent of Schools, County Surveyor and County Assessor. In addition to this, by Art. 6, Sec. 17, it is imperatively required that at least one term of the District Court shall be held in each County every year, and by Sec. 19, that a Clerk of said Court shall be appointed in every County, whose compensation shall be as provided by law; and by Sec. 22, that in each County there should thereafter be elected every third year a County Judge, "whose compensation shall be or may be provided by law;" and by Sec. 23 this County Court is one of record, having original jurisdiction in all matters of probate, etc., and having concurrent jurisdiction with

the District Court to the amount of $2,000. It is further provided, Art. 2, Sec. 6, "that Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person or property or character, and that right and justice shall be administered without sale, denial or delay." Also, by the Schedule to the Constitution, Sec. 4, it is provided, "the General Assembly shall pass all laws necessary to carry into effect the provisions of the Constitution."

It is clear then, that it was not only a right on the part of the General Assembly to provide by legislation all means necessary to carry on the State Government, but it was its duty to provide for the election or appointment of all County and Precinct officers, that the public convenience might require, and to provide for their compensation. Hence any construction of the sixth Section of Article 11, which would even *probably* result in a conflict with other provisions, much more a construction that would most inevitably tend to impair the efficiency of officers provided for in the Constitution in attaining the end sought—good government—should, if possible, be avoided. Still further in this connection we call attention to the fact that at the first meeting of the General Assembly in November, 1876, laws were passsed (General Laws of 1877, State of Colorado) which in general provided for the holding of elections for State and County officers, the support of the poor, the holding of courts, the care, custody and prosecution of criminals, as well as the election and appointment of many other county officers, judges of election, etc., and also for their compensation, and it is for fees or salaries thus fixed by the General Assembly, that the claims were made, which claims having been audited, in accordance with law, the warrants in suit were issued. And still further, as appears by the statement contained in the bill of exceptions, from the day the Constitution

was adopted, or at least from the date when the limit, if limit there was, in Sec. 6, took effect, until the year 1886, every County in the State that reached the limit claimed (about one-third of the whole number) passed such limit, and in the case of plaintiff in error, having an indebtedness of $50,000 in bonds issued to build a court house, and a floating debt of $500,000 beside, the electors, under and in pursuant of an Act of the General Assembly of February 21, 1881, voted to fund such floating indebtedness, and did, thereupon, fund and issue bonds therefor, and did increase debts in excess of limitation now claimed; and this matter of funding and issuing bonds is true also, as the statement shows, of two other Counties, while at least five other Counties issued bonds for the erection of county buildings or making roads and bridges, to almost precisely the exact amount to which they would be limited, if the limitation applies alone to debts for those purposes. Beside this, *all* county warrants were from 1876 to 1886, received in payment of county taxes, without reference to the amount of indebtedness of the County existing at that time. So that probably three-fourths of the taxes of Lake County from 1876 to 1886 were paid in warrants, which, if the construction of plaintiff in error is true, were wholly void. (See Rec. folios 73 and 89). And more than this, in a half dozen cases of suits, both in the Federal and in the State Courts, involving at least $125,000, and brought on warrants of the County against which the defense now sought to be made, was as available as it is here, no defense of the kind was ever attempted, though other defenses to some of the warrants were made, judgments going against the County in various suits for years, and these judgments have been paid, or are in process of payment.

Such in brief are the facts as they *existed* at the time of adoption of Constitution and up to time when this action

was brought, in view of which, the Circuit Court construed section 6 to be *no* limitation upon debts incurred by operation of law by the county officers in carrying on the business of the county.

In discussing the question thus presented, we say: First, It is a settled rule of construction, that in construing such a section, we must presume that no superfluous words were used, meaning must be given to every word used; and if possible it must be so construed as to make every word significant of something, so as, if possible, to make every word operative, and, above all, as the section is one of many in one instrument it must be so construed as to be consistent with the objects of the whole instrument and to secure effectiveness to all parts of it.

Platt vs. U. P. R'y Co., 58.
U. S. vs. Basset, 2 Story, 389.
Derr vs. Dubois, 16 N. Y., 285.
People vs. Osborn, 7 Colo., 605.
Opinion of Judges, 22 Pick., 573.
Commonwealth vs. McCaughy, 9 Gray, 297.

And since, as we have seen, the existence of the various counties of the State, who were recognized by the Constitution itself as having plenary powers in some directions, such powers can be limited only by express, or implied Constitutional restrictions, and to authorize an implied limitation the implication must be a necessary one.

People vs. Rucker, 5 Colo., 455.
People vs. Wright, 6 Colo., 92.
Alexander vs. People, 7 Colo., 155.

Proceeding then to construe we say:

First—The first three lines is plainly declaratory of the scope and intent of the section, viz., to restrain the contracting of debts by loan, and to restrain that class of

debts to the purpose of building roads and bridges, and the repair thereof.

Second—To limit the amount that could be contracted in any one year, and

Third—To limit the amount of the aggregate of such debts procured in any number of years, and

Fourth—To provide for a contingency by allowing the people by vote to exceed the first limits named.

Fifth—The words "by loan, in any form," are used in this same article in the same way, to restrict incurment of debt by loan, as to State (sections 3 and 4), except for certain stated purposes, and the amount of debt that may be incurred by the State, and the amount of debt incurred for one year for some of these debts, is fixed, and others remain unlimited, while as to school districts, the same article (section 7), the prohibition is to contract debts by loan, unless upon a vote, etc.; and in relation to cities and towns (section 8), the inhibition is as to the manner of contracting such debt by loan; it must be by ordinance irrepealable, etc., providing for levy, etc., followed by a proviso that no such debt shall be thus created until an affirmative vote was had; and, further, that the aggregate of the debt so created, together with existing debt, shall not at any time exceed, etc. Now, as all these sections are in *pari materia* with section 6, they must all be considered in construing section 6. In looking at section 3 it is clear that the restriction, as to incurment of debts by loan, is confined to four purpose, viz.: To provide for defraying of erection of public buildings, defense of State, and assistance to the United States. The first is limited for one year, and "such debt" is afterwards limited for all years, and the same is true as to public buildings, while the other two, involving the life of the State and nation, is unlimited.

Sixth—If, now, we interpolate the word "such" before the word indebtedness, in the tenth line, and after the words "aggregate amount," we shall have precisely the same limitations in the same words as in Sec. 3, and we shall leave unlimited those debts, the incurment of which are had without a loan, but which are essential to county government and county life, and the interpolation of the word is warranted by the rule.

Again, in construing, Courts are not confined to the letter of the section or to the exact words, as these may be rejected or restrained, or others substituted to meet the intention of the section:

Reiche vs. Smyth, 13 Wall., 162.
U. S. vs. Buchanan, 9 Fed. Rep., 689.
Jay vs. Bond, 7 Cranch, 353.
Walker vs. City of Springfield, 94 Ill., 364.
Dwarris on Statutes, 194.

Again, the construction must be such as, if possible, not to lead to injustice or absurd consequences, and infringe as little as possible on the existing rights of individuals. Or, as the rule was expressed by this Court in U. S. vs. Kirby, 7 Wall., 486: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always be presumed that the Legislature included exceptions to its language which would *avoid results of this character.*"

U. S. vs. Fisher, 2 Cranch, 358.
Chinese Merchant Car, 13 F. R., 605.
S. P. R. R. Co. vs. Orton, 32 F. R., 457–477.
Cooley's Const. Lim., 86–87.
Dwarris on Statutes, Rule 4, p. 144.
Edwards vs. City of S., 84 Ill., 626.

And here we say the construction contended for by plaintiff in error leads to absurdity in this:

First—To construe it as we must, as a whole, and especially to make it include debts, however incurred, the limitation of indebtedness contracted in any one year must be held to include *all* debts, whether contracted for buildings, roads and bridges, or not, since the aggregate of the debt for all this is fixed at twice the amount which could be incurred in one year, and it is absurd to say the maker of the section could see any reason for fixing a limit to the aggregate indebtedness for the costs of running a county, supporting its paupers, prosecuting its criminals, keeping open its Courts and paying officers' fees and salaries, at twice what it might expend in one year for erecting buildings and making roads.

Second—There is neither sense nor reason in trying to restrict or limit the power of a county to incur debt for a certain amount for one year, since the whole end and aim of county government may make it imperative that by an exigency like that of a riot, influx and prosecution of criminals and support of the poor, may, in the first year, render the incurment of a debt equal to what they could incur in two years, absolutely necessary, or render county government impossible. Witness the riot in 1882 in Lake County.

Third—But if the limit for one year is applied only to debts contracted by loan, and they can only be contracted for buildings, roads and bridges, then the aggregate amount must be confined to the same class of indebtedness—"by loan"—and then the limitation, both as to one year and all years, is reasonable. Since, in these matters, it is easy to determine the amount that should be expended, and they can get along with such expenditures, if the erection of a court-house is too much for one year,

wait two, and hire a hall, and continue the erection and completion of it and the roads and bridges for years.

Fourth—It is absurd to the last degree to require of a county to provide for the payment, either by taxation or by contracting a debt by loan, either with or without a vote, but especially by a vote, of expense that in the very nature can only be guessed at, such as the expense of the Sheriff in keeping prisoners, making arrests, etc., the support of paupers, the payment of jurors, witnesses, etc., and so the Supreme Court of Missouri has decided in the cases of Book vs. Earl, and Potter vs. Douglas County, hereafter referred to.

Fifth—The very words of the section relating to a vote, shows that it is a vote in favor of incurring a debt, not a vote to enable the County Commissioners to incur debt, or for the county to incur it, if demands against it should arise; the words are that "a majority of those voting thereon shall vote in favor of incurring THE debt," so, too, the words following immediately after the words "*the debt*," "but the bonds, if any, be issued therefor" shall run, etc., shows that, whether bonds did, or did not issue, in the view of the makers of that section, "the debt" was one for which bonds could issue, but an issue of bonds would make a debt "by loan," for nobody will be foolish enough to contend that a vote enabling the County Commissioners to provide for county expenses, could be held also to authorize the issue of bonds to meet such expenses —but since issue of bonds would be contracting debt "by loan," and, as by the first lines of section —, "debts by loan in any form" could be contracted only for public buildings, roads and bridges, it is clear to a demonstration that this vote, by which the aggregate amount of indebtedness that might be incurred, cannot be made to apply to anything except to debts by loan, and, per consequence, to debt incurred for buildings, roads and bridges only.

Sixth—The construction claimed by plaintiff in error makes the section absurd in its consequence in this: at time of adoption of this section, only two Counties in the State had more than $5,000,000 of valuation—Arapahoe with some $9,000,000, Pueblo next. The limit of indebtedness without a vote was, in all with less than five millions, $6 to $1,000 of valuation, or $6,000 to the million, and with a vote twice that, and if its contention is correct. Since any of these Counties could, in two years time by a vote, by loan, incur an indebtedness for buildings, roads and bridges alone, equal to the amount that under any circumstances it could incur for any and all purposes, and, as a matter of fact, several of the counties did do so —leaving the county helpless (See record, fol. 90)—rendering it impossible for at least ten years (the life of the bond) for the County to incur in any manner, for any purpose, any debt whatever.

Seventh—The construction is not only absurd, but it may result, and certainly will in the future, if adopted, destroy County government and thus impair the State government, for not only is it true that "the laborer is worthy of his hire," but it is equally true that he will neither labor nor hire to labor without pay. For fifteen years before the Constitution was adopted and till now, the laws of the State and Territory fixed fees and salaries, and the Constitution not only continued this law in force but by article 14 provided that thereafter "the compensation of all County and Precinct officials should be as provided by law." It is absurd to construe section 6, article 11, so as to nullify article 14, and so make the Constitution commit *hari kari* and disembowel itself, and it is still more absurd to say, let this be provided for by taxation, since, as everyone knows, unless taxation was imposed at random and on a guess, there would inevitably arise

many cases where the money arising from that source would not meet the exigency, and since, as by defendant's method, no debt could be incurred by the officers' service, if the debt had already reached the amount limited, he never could be legally compensated, since no Board could ever allow any but legal demands. Again, since 1868, till now, the law has been that all County warrants not paid at presentation, are registered, and thereafter all moneys coming to the treasury are paid out to redeem such warrants in the order of registration; now, nearly half the Counties in the State have a registered warrant debt fully up to the limit claimed, the allowance of any and every account makes a debt beyond the limit, and by the assumption void, and the County officers of to-day must work for nothing, since no further debt can be incurred, and that is now the case in several Counties.

Eighth—The construction claimed by plaintiff in error is absurd in this: by the laws of the State ever since it was a State till 1885, all County warrants were receivable in payment of County taxes. Half the Counties of the State, and notably Lake County, has ever since 1879 been in debt, and, in defendant's view, beyond the limits of the Constitution, and at least five-sixths of its warrants issued since 1879 are, on that assumption, void. Yet four-fifths of the County and road warrants have been received in payment of taxes, and as a void warrant can never pay a public tax, on defendant's assumption four-fifths of Lake's County and road taxes for ten years are still unpaid. (Record folio 89.)

Ninth—The construction contended for by plaintiff in error not only works an absurdity but absolute injustice as well. From the date of adoption of the Constitution till now, no County in the State, nor any of its officers, ever failed to audit and allow all accounts presented to it, on

proof of amount due, and warrants were drawn. All County officers, witnesses, jurors, all expenses of State and County elections, etc., have been paid in these warrants, and *no* man, prior to January 26, 1886, ever heard of any denial, by their officers or any one else, of their validity, no constitutional objection was ever raised, in the hands of men who performed service or sold to the County goods. In the hands of men who paid the holder in cash there is to-day warrants of not less than $800,000 in value, *not* one of which is tainted with any fraud, all of which were honestly issued for honest debts, subject to no earthly objection, legal or moral, except the one now urged, the constitutional limitation, and all issued and taken before such objection was ever made, and yet it is now proposed to have this Court declare that they are *all* void.

III.

The rule that in construing the primary object of the Court is to ascertain the intention of the maker and to so construe as to best effectuate that intention, and to cause as little of inconvenience and hardship to all concerned as is possible, is too familiar to need any citation of authorities, since even the text works are united on that point, so we cite none, but proceed to call attention to the facts and language bearing on that point. In doing so we say:

(*a.*) The maxim of "*Expressio unius exclusio alterius*" is, as this Court said in U. S. vs. Arredendo, 6 Pet., 725, "an universal maxim in the construction of a statute," and is peculiarly applicable to a constitution, and more especially so when the expressed object is a restriction or limitation of power, since it is a rule of logic that affirmative words in such case imply a negative of what is not affirmed. "Affirmative expressions prohibiting by a new

imposition some things, imply a negative of all not within the terms of the prohibition as expressed." (Broom's Legal Maxims, 505.) And this maxim more especially applies where exceptions follow general words, or where certain specific things are subjected to a change or restriction, it seems then to exclude everything else, even of a similar nature.

Broom's Legal Maxims, 515, 516 and 517.
U. S. vs. Fisher, 2 Cranch., 358, 387.
In re Bliss, 9 John., 349.
Rex vs. Richardson, 3 Burr., 104.
Rex vs. Bell, 7 Term R., 600.
Dwarris on Statutes, 221.
Gaddis vs. Richland County, 92 Ill., 124.
Brush vs. Lemmon, 77 Ill., 496.

(*b.*) It is a maxim of interpretation that general words following particular words apply to things *ejusdem generis*.

Riche vs. Smythe, 13 Wall., 162.
U. S. vs. Fisher, 2 Cranch., 358, 387, 400.
U. S. vs. Kirby, 7 Wall., 482.
U. S. vs. Irwin, 5 McLean, 178.
U. S. vs. Searles, 52 Wall., 492.
Chegory vs. Mayne, 13 N. Y., 220.

The word *all* is a general not a universal term and is to be understood and construed as used in one or the other sense according to the sense.

U. S. vs. Herron, 20 Wall., 251.
Stone vs. Elliott, 11 O. St., 258.
Keiffer vs. Ehler, 18 Penn. St., 391.

Clearly in construing this section, since we must give effect to the words "contract any debt by loan," it must

be held that one class of debts is expressly mentioned and impliedly every other class is excluded, nor can the words "the aggregate amount of indebtedness for all purposes' be held to introduce any other class, since, by the maxim quoted, these debts must be *ejusdem generis* with those mentioned, besides the direct effect of the interpretation contended for by defendant is to utterly ignore and make of no effect *all* the words first used, and it is absurd to suppose those words thus used in four sections were to have *no* effect.

(*c.*) In construing a statute a limiting clause is to be restricted to the last antecedent where the matter itself does not prevent it.

Dwarris on Statutes, 209, 210.
Cushing vs. Hornish, 9 Grey, 382.
Rex vs. Wright, 1 A. & E., 434, 448.
Stacy vs. Nelson, 12 McW., 541.

The limitation then of section 6, contended for by plaintiff in error, and commencing with the words "and the aggregate amount, etc.," clearly, logically and legally refers to the antecedent, *debts limited* and to *no* others, viz., debts contracted by loan for buildings, etc.

(*d.*) Another canon of interpretation is that general words occurring at the beginning of a sentence govern the whole matter contained in it, and so of words at the end, but not so of words in the middle of a sentence or section, as in the latter case, the general words may be limited by some relative words like such, said, or aforesaid, to a particular thing contained in a preceding sentence.

Dwarris on Statutory Law, 217, 218.
King vs. Inhabitants of Gwenop, 3 Term, 135.
Morris vs. Mellin, 6 B. & C., 446.

If we apply this canon we see that not only does the language used in the beginning of the section show that the words "contract debt by loan" govern the whole section as it stands at the beginning, and is declaratory of it, but more than this the copulative conjunction "and" shows that the limitation following thereafter and introduced in the middle of the section is *not* an enlargement of the class or kind of debt, *but* simply a limitation of the same class of debts for *all* time, that by previous limitation had been had for *one* year at a time, and the language *used* afterwards in respect to the vote, etc., shows *beyond* dispute that *that* debt so to be fixed by vote referred to the same debt and to no other that was mentioned in the beginning, etc.

(*e.*) In determining the intent, we are further bound to ascertain the situation of the parties, etc., as well as the evils to be guarded against. Imputing now to the convention that framed our Constitution ordinary intelligence only, we find they must have known these facts, to wit: that the State of Colorado, at that date, had not to exceed 100,000 inhabitants, or less than one to every square mile, while no other State, unless it was Nevada, had less than five, and nearly all had from 8 to 80; Pennsylvania having 77, Illinois 46, Missouri 26, Iowa 21, and so on, while Colorado, in 1870, had but 38-100ths, and in 1880 had but 1 86-100ths inhabitants to the square mile. They must have known, also, that a majority of the Counties had not one person to 100 square miles, since nearly one-half of the inhabitants were found in four out of the twenty-six counties, while noticeably, Lake County, which then included the territory now covered by Rio Grande, Gunnison, Chaffee, Pitkin, Mesa, Delta and Montrose, and including an area of not less than 15,000 square miles, had a population not to exceed 600, or one to every 25 miles; a territory

larger than the State of Rhode Island, Massachusetts, Connecticut and Delaware, one-third as large as the State of Pennsylvania, and nearly twice as large as the State of New Jersey, without roads or bridges, no public buildings of any kind, and with numerous canyons and mountain streams of great size, absolutely impassable for want of bridges, and all or nearly all of it a mineral region, awaiting and expecting at any moment the advent of the miners, who were liable to come and did come in a few years thereafter by thousands in a month, bringing no property but that which he carried on his back, or, if in luck, on his burro. That the two great industries of the State—mining and cattle raising—were both of such a nature as to attract the most reckless class from all parts of the world, and have always thus attracted them; that for the past fifteen years the cost of living, the expenses necessary to support the County, prosecute and punish criminals and pay the fees and salaries of officers, jurors and witnesses, had been greater in this State than in any other in the Union, and the necessities for such expenditure was as great as in any other place in the world; that the arrest of criminals alone, and their transportation to and keeping in jail, was frequently enormous, and that such expenses were almost certain to increase ten times as fast as the means of paying them, and that a month, or at the longest, three months, would frequently transform the silence of a mountain into a thriving mining camp, with hundreds and thousands of men and unlimited demand for official surveillance and its consequent expenses. And yet, with all this, we are asked to suppose they intended to so limit a County's powers to incur a debt necessary for its very life, to the paltry sum of $6 upon the $1,000 of valuation, or the half of that sum, with no power to meet a dollar beyond this, except by voting upon a proposition to raise the amount needed,

nobody knowing what would be needed, since no one could anticipate what such necessary expense would be.

Again, we notice this convention knew the valuation must for many years be low, as it provided that mines should not be taxed for ten years, and of the 67,800,000 acres of land in the State, only about 750,000 were cultivated, and not more than one million of acres were liable to taxation. Even so late as 1881 forty millions were still unsurveyed.

(*f*) Again, we are bound to find since they fixed the taxes at biennial sessions of the Legislature, and allowed no County to tax beyond the limit authorized by it, that exigencies must arise, as we know they did in Lake County in 1882, in Gunnison County in 1884, in which the preservation of the peace, the trial and conviction of murderers, or the detention of prisoners, would exhaust every dollar of the County money or tax levy for the year, and also *more* than the amount limited as the aggregate, if this aggregate include such accounts, and the County could have no relief from the Legislature, for certainly one, or perhaps two years. And we are also bound to find that it did not act except upon some information which would justify such action in limiting all debts. The undisputed facts in this case, and admitted here, is that the floating debt of *no* county in the State had ever at that time been the subject of comment—even as being burdensome. All told it was not to exceed $150,000, and this amount was registered and being paid off from year to year; a mere bagatelle, about which nobody complained.

(*g*) We are bound to find that this convention in adopting the language and opinions of this section were acting, to some extent at least, as other States that have already adopted similar provisions—and that if different phraseology is used it was the intention to make some what different provisions. Prior to 1876 seven States had

adopted a similar provision in their Constitutions, to wit: Iowa in 1846, Oregon in 1857, Illinois in 1870, Pennsylvania in 1873, West Virginia in 1872, Wisconsin in 1874, Missouri in 1875. The language in Iowa is: "No county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per cent on the value of the taxable property within said county," etc.

Illinois says: "No county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of taxable property therein."

Pennsylvania says: "The *debt* of any county, city, etc., except as herein provided, shall never exceed *seven* per centum upon the assessed value of the taxable property therein; nor shall any such municipality incur any *new* debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed value without the assent of the electors."

Missouri says: "No county, city, * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof. * * * Nor in cases requiring such assent shall any *indebtedness be allowed* to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per cent on the value of taxable property for County purposes; provided, that with such assent any County may be allowed to become indebted to a larger amount for the erection of a court house or jail."

In addition to this we notice the State of Michigan in Constitution adopted in 1850, Art. X, Sec. 8, says:

"The Board of Supervisors of any County may borrow

or raise by tax one thousand dollars, for constructing or repairing public buildings, highways and bridges, but no greater sum shall be borrowed or raised in any one year, unless authorized by a majority of the electors voting therein."

We note also, the recognition of the interpretation we contend for as shown in the Constitution of North Carolina, made in 1875 and adopted in 1876, Art. VII, Sec. 7:

"No County, city or town shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any of the officers of the same, *except for the necessary expenses thereof; unless by a vote of a majority of the qualified voters therein.*"

The language used in Oregon is: "No County shall create any debts or liabilities which shall singly or in the aggregate exceed five thousand dollars, except to suppress invasions." West Virginia, (1872), says: "No County * * * , except in cases where bonds have been issued, etc., shall hereafter be allowed to become indebted in any manner, for any purpose, in the aggregate exceeding five per cent. on value of taxable property." Wisconsin, by amendments, (1874), says: "No county * * shall be allowed to become indebted in any manner, for any purpose, to any amount exceeding five per cent. of taxable property therein."

As to these provisions of these seven States, we note, First: There is not one where the limitation is to debts by "loan," nor one where the word *contract* is used, but in *all* cases except that of Pennsylvania and Oregon, the prohibition is that they shall not be allowed to become indebted "in any manner or for any purpose." In Pennsylvania it is, "said debts shall *never exceed*, etc." In Oregon "*no* debt shall be *created* to exceed, etc."

Second: The limitation in all of them is in language of

all debts, however incurred, for whatever purpose incurred, and in this respect varies very much from ours.

Third: In all except Oregon, where a gross sum is fixed, the limitation is in no State less than *five*, and in Pennsylvania *seven* per cent. on assessed values, four out of the seven only excluding existing indebtedness. While the limitation of our Constitution, as claimed by the defendant, is three mills, or one and a half mills per year, the same limit being put at the annual income of the county in Missouri and two per cent on assessed value, and six mills or twelve mills as the aggregate of all, and on a vote taken—in other words *all* of the old rich states, old and rich at date of constitution, fixed a limitation to cover the same class of expenses, by the same bodies, at from four to twenty times as great as in this State, and unless we attribute the densest ignorance to the makers of our constitution, we must *hold* that they knew that many if not *all* the counties would be unable to keep within the limit.

Fourth: That the language of all these States, is plain and unequivocal and vastly more imperative in respect to construction than ours. Yet as we have seen, Missouri at least, has held that necessary county expenses is not included in the limitations, and that is the only State where the question has been raised until now, and hence we think it must be held that a limit so extraordinarily low was never intended to include necessary expenses of a county.

Besides this, the exact distinction we contend for, to wit: that between debts incurred for things necessary to a county's being and efficacy, is as we have seen, distinctly recognized in the Constitution of Mich., (1850), where it *names* and limits indebtedness for buildings, roads and bridges, and repairs thereof, precisely as we say ours in effect does. While North Carolina in 1875, *excepts* in express terms and identical language just what we say ours

must except by virtue of the language used and by virtue of the reason out of which it grew, viz., necessary expenses of a county. It is much more reasonable to suppose the makers of our Constitution had sense enough to see what other States had seen and provided for, than to suppose they had so little as not to know that counties in Colorado would have a necessity only for one-fourth or one-twentieth as much as counties in the older States, and that they did not know that the expenses in this State of a county would naturally be three times what it was in the older States.

Since then, counties, county officers and the powers of county officers is especially recognized in the Constitution, and the salaries and fees are by it to be fixed by legislative enactment, and since by the schedule of the constitution, all laws relating to these officers and persons were left in force, it follows that as to all powers formed *before* the Constitution the same was possessed afterwards, except by limitation, and that limitation, like limitation on legislative powers, must be strictly construed.

S. P. R. R. Co. vs. Orton, 32 F. R., 451 and case cited.

It follows further, that as such officers must, from the start, administer these laws, within the limits imposed, the moment they reach the limit claimed for section 6, that moment and *not* before, they must begin to construe the section; *hence* all who have passed the limit and all who have reached it and refused to pass it, have construed the section. But it is an undeniable fact that *no* county ever has reached the limit and failed to pass it, while a majority of the counties to which the limit applied, that is, having a valuation exceeding one million, have passed it. Hence we say contemporary construction of that section by parties whose duty it became to construe, is all one way—and that brings us to the proposition, that con-

temporaneous construction of a written instrument, statute or constitution has by all Courts and for many years, been held equivalent to *positive* law, and of judicial interpretation, and no Court has given stronger expression to this rule than has this Court. In Stuart vs. Laird, 1 Cranch., 299, this Court gave its solemn sanction to the doctrine in in declaring that a contemporaneous exposition of the Constitution practised and acquiesced in for a period of years fixes its construction, and in McKeen vs. DeLany's Lessee, 5 Cranch., 22, it further held that the practical construction given to a statute for some years, must be enforced, although *not* authorized by the laws of the land itself.

Edward vs. Darby, 12 Wheaton, 206.
U. S. vs. Ship Recorder, 1 Blatchf., 222–26.
Miller vs. McQuerry, 5 McLean, 482.
Martin vs. Hunter's Lessee, 1 Wheaton, 351.
Cohen vs. Virginia, 6 Wheaton, 264.
Roper vs. Goodwin, 2 Mass.. 477.
Cooley Const. Laws, 81.
Chestwright vs. Stone, 14 O., 599.

We claim contemporary construction of this section as we now construe it, by the counties of Boulder, Chaffee, Lake, Fremont and Mesa, in the issuing of bonds, beginning with Lake County, in 1880, and continuing up to December 1, 1885—such bonds being for public buildings and bridges.

In every one of which, with one exception, and that of only $200, these counties issued bonds to the full amount, less a few dollars of that to which, as now claimed by defendants, they were limited for all purposes, though in every instance these counties had also debts of from $5,000 to $75,000 then out in warrants.—See Record folio 98.

Second—Construction by every county that reached the limit, by passing it.

Third—By the counties continuing to take and never refusing to take warrants issued long after the limit had been reached, in payment of taxes.

Fourth—By several of the counties, and by every county that ever voted to fund its floating debt, submitting to a vote the question of funding warrants vastly beyond the limit, and afterward funding them and giving in exchange the bonds of the county, and for years paying the interest on such bonds.

Fifth—By never to any suit instituted on bonds setting up any claim of limitation until *ten* years after the adoption of the constitution, and by going into Court and making other defenses to some of these bonds, and notably in suits vs. Lake county in both the State Courts, and Circuit Court, allowing and agreeing upon judgment on warrants issued, when largely in excess of the limit, which judgments they are now paying. In Lake county, by issuing warrants for county expenses, when the court house bonds *alone* were in excess of the limits claimed now, while at the same time they paid interest on the court house bonds.

Sixth—Not only did all these county officers construe, but every voter in Lake, Gunnison and Chaffee, who voted to fund these debts also construed, since everyone knew that if construed as defendants now construe, every dollar of the $500,000 funded was invalid.

Seventh—The Legislature at the first and every subsequent session, construed it as we now do. In 1877, at the first session, commencing November, 1876, it passed a law to authorize counties to contract by loan for buildings, roads and bridges, and made no provision for contracting debt for any other purpose, but passed an act

providing for a vote on funding the old warrant debts. In 1879 it passed another act for counties having debts of $5,000 and upwards to fund the debt, and provided that the whole issue should not exceed the floating debt due May 1, 1879, and made the County Commissioners judges to determine that amount. In 1881, another funding act, with same provisions, applying only to counties having a floating debt of $10,000 and upwards, was passed, and to this actthe emergency clause was applied, because it says "several counties that now have a large floating indebtedness would be benefited by the act." Also, in the act of 1883, by which it validated the donations of several counties to the National Mining Exposition, although those counties were then beyond the limits of the Constitution, as claimed; and, lastly, by never, at any time, up to this time, having ever made any provision whatever by law for submitting any question of the incurment of any debts by counties, except to erect buildings, roads and bridges, or to fund a floating debt, although it is clear that they recognize the fact that large debts, and debts beyond $10,000, were due from many—$10,000 being, in most cases, in excess of what was valid under the claim now made.

See Rec., fols. 91 to 97.

Eighth—The Courts, as well as all county officers, continued from 1876 up to March, 1886, to construe it as we construe it—for if, as is now contended, the record of valuation and the amount of debt must be taken notice of, and all beyond an amount limited, then no Court ought to give judgment on what was clearly shown to be void paper. Yet, they did give judgment in a score of cases. Lastly, in construing a constitution, we are to find, if possible, not what the makers intended in making it, but what the people who adopted it intended (Cooley Con. Law, 80), and here certainly it must be admitted that they

intended such construction or meaning, as, from the time of its adoption for ten years, the people deliberately adopted and acted upon. If now we take the officers of each county, or even the Board of County Commissioners, or the Treasurer alone, and notice that for ten years not one of them has ever suggested any other construction than the one we now contend for, and add to that that a majority of them have actually, by action, construed it as we do; add to that the fact that all the people of all the counties who have voted on bonds, whether funding or building bonds, have also done so, and we shall have not only a large portion of the people declaring for this construction, but a very large number of the representative men, and when we add to that the seventy-six members of the Legislature for five sessions, and we think it not too much to say that our construction has been, till recently, approved and acted upon by everybody in the State.

We contend that a State Constitution, establishing the fundamental law of the State, must be in harmony with itself, and if two constructions of any part of it be possible, that construction must be adopted, which will not only best harmonize with other sections, but so as to give compensation when compensation is due, and to make effective every agency provided in it to make the State government effective, since the organization of administrative power of counties is recognized, and is necessary to State government, neither any part of the Constitution or the statutes should be construed so as to render them less suitable to effectuate their ends. Neither the machinery of elections, the collection of the taxes, or the prosecution of criminals, can be carried on except through the county officers. Hence, not only must the counties be

preserved, but provision made for payment of county officers.

People vs. Wright, 6 Colo., 92.
People vs. Draper, 15 N. Y., 541–2.
People vs. Frenche, 50 N. Y., 291.

In this latter case, speaking of Constitutions, the Court says: They are made by practical men for the practical administration of the government, and they are to receive that interpretation which will give to the intent of the framer, as deducible from the language employed, and operate most benignly in the interest of the government, and best harmonize with and give effect to the general scope and design of the instrument.

McClusky vs. Cromwell, 11 N. Y., 601.

By section 17, article 6, one term of the District Court must be held each year in each County—the Counties are compelled to elect officers, and their compensation is to be fixed by the Legislature, and such compensation may not be changed by the Legislature during the term of office (article 14, sections 6, 7, 8, 11 and 15), and these officers are, by the laws of the State since 1887, compelled to qualify and give bond, or pay penalty, and yet their compensation, it is said, may be rendered impossible at any time by unexpected, unforeseen, and unavoidable County expenses. Usually a public officer is entitled to compensation, beyond all controversy.

Riply vs. Gifford, 11 Ia., 367.
Baldwin vs. Kouns, 2 Southern R., 691.

And since he is thus entitled and his compensation is by the Constitution to be fixed by it, this same Constitution cannot be so construed as from one year to another to deprive him of such compensation, and when the Leg-

islature failed to provide for payment by tax, it must be found that it then construed the Constitution to have provided or left others free to provide for such payment.

We submit further, that there is no rule of law nor sense, much less of morals, that calls for such a construction as defendant claims, for aside from the maxim *ita scripta est*, there is no reason why it should apply, and as we think we have shown abundant reason why it should not, and that it is not *ita scripta*. Such a construction can only be necessary when it appears that there is some liability to a wrong being perpetrated, if it be not insisted on. But here not only is the statute ample in its protection against fraud by its requirements as to allowance, etc., but by far the greater amount of County expenses is for fees fixed by statute, for services performed, and paid only after performance, and only then upon allowance and audit by men elected for that purpose. Not one word of complaint has been made against the honesty of the claim, allowed by the various Counties, and the most that ever has been urged in the score of cases brought into Court and on which judgment was got, to the amount of at least $150,000, was that half a dozen or so, involving a few dollars, were inflated or had been allowed for too large a sum. This too had been the law, unlimited by anything from 1861 to 1876, and no complaint ever heard. Besides, we assert that it is a favorite doctrine, with the United States Courts, at least, to solve doubts, if any exist, whether arising out of a contract, a statute or a Constitution, in favor of good faith and honesty in dealing, and this Court has thus expressed its leanings: "We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice."

Gelpecke vs. City of D., 1 Wall., 206.

In Henderson vs. Jackson Co., 2 McCrary, 621, speaking

of municipal bonds, the Court says: "The town of Westport or the district of which it forms a part have accomplished the object of constructing a horse railroad, and are enjoying its benefits. They have recognized the bonds and given them value by paying part, and interest on the whole for some years. To turn round now after all this and say no power to issue the bonds existed, savors of injustice not to be tolerated or upheld by a Court, unless bound to do so under the strict letter of the law. *Any doubt as to the proper construction of the act must be solved in favor of good faith.*"

Moran vs. Com. of Miami Co., 2 Black, 722.

And in 1 Gall., 133, the Court says, "In a doubtful case it is a sound rule of construction that the words are to be expounded in favor of the citizen and against the Legislature." And this is the spirit that breathes through each and every one of the many cases decided by the Supreme Court of the United States, relating to municipal indebtedness. And this we assert to be the spirit of every Supreme Court in every State of the Union, save one, and it has been the just boast of many, that no honest debt has ever been repudiated by them.

Commonwealth vs. Com. of Alleghany Co., 32 Penn. St.,

II.

Again, this section 6 must be construed, we think, as *in pari materia* with sections 4, 5, 7 and 8, and in construing one section Courts will not only look at *all* those, but will also look at like sections in other constitutions which were evidently meant to an a like end. If we look at the other States, as we have seen, the language is plain and unequivocal, and seeks to include *all* debts however incurred, and for whatever purpose, and the *fact* that with

this plain language befor them different language is adopted in one case compels a different construction, unless the difference is made to disappear by disregarding some of the words. It is clear that the construction sought by defendant can be reached only by dropping out the words "by loan," since the claim is that the limitation covers *all* debts, the same as in Iowa. But if these words are dropped for one purpose they must be dropped for all, and the section reads, "No county shall contract any debts in any form, *except* for the purpose of erecting public buildings, making or repairing roads and bridges;" and that would leave a county powerless to contract any debt, for ordinary expenses. Even the plaintiff in error sees the absurdity of that, and does not claim it. Again, if these words are dropped out in section 6, why should they not be dropped out in sections 3 and 7 and 8; and if this be done these sections become nonsense. Take section 8, it will read: "No city or town shall contract any debt in any form, except by means of an ordinance," etc. A reading that makes the words absurd, for it would require an act of a city council for every single item of expenditure, unless there was money already in the treasury to pay for it.

Again, there is clearly two classes of debts referred to directly and by implication in said section 6, viz., debts "by loan," and debts *not* by loan. But in addition to these the Courts, both of the State of Colorado and other States, as well as this Court, recognizes at least two other kinds of debts, which are not included within the limitation of section 6, or of any similar constitutional provision. The first is, debts arising *ex delicto*. On this point the Supreme Court of the State of Colorado, in People *ex rel.* Seeley, 9 Colo., 41[illegible] speaking of this section (6), says: "It is clear that the language under consideration deals with indebtedness that is reasonably anticipated as

a result of *voluntary action* by the Legislature or County authorities, such indebtedness as springs from express or implied contracts, involving liability arising *ex delicto*, is a subject that is *not contemplated by the provision.*" This doctrine is also found in City of Bloomington vs. Perdue, 99 Ill., 329; Sexton vs. Chicago, 115 Ill., 245, and Barth vs. City of Des Moines, 38 Ia., 415.

There is also another class of debts that is also excluded from the operation of this section, viz., judgment debts. Even though such judgment was obtained on debts, that before reduced to judgment were within the operation or limitation of such a section; and this doctrine has been held by this Court in U. S. vs. N. O., 98 U. S., 395, in which it said: "If limitation existed it should have been insisted on when the suit was pending, and contained in the judgments." See, also,

Mayor vs. Lord, 9 Wall., 409.
U. S. vs. Board of Auditors, 28 Fed. Rep., 407.
Town of Lyon vs. Coolidge, 89 Ill., 529.

Indeed, if this is not the law, then is the conclusiveness of a judgment as to matters that might have been pleaded in, for if the action on which judgment was got of no account whatever. Beside this, in S. C. & St. P. R. Co. vs. Co. of Osceola, 45 Ia., 168, and *Id.* vs. Osceola Co., 52 Ia., 26, the S. C. of Ia. held: a judgment obtained on warrants that were in excess of a constitutional limitation, even though the judgment was got by reason of the County authorities fraudulently omitting to interfere in the defense, was yet good and not within the limitation. There are then, beyond dispute, certain kinds of debts, or debts incurred in a certain manner, or evidenced in a certain way, that are undeniably *not* within the limitation of section 6, and these exceptions to the operation of the section are not controverted by plaintiff in error. In

addition to these, we contend that in this case and in construing this section, both the language of the section, the reason for it and the manifest absurdity to which any other construction leads, compels a construction that in addition to those already noticed, as exceptions to the limitation, all debts due by operation of law in carrying on the ordinary business of a County are excluded from such limitation.

All these adjudications have been had upon a construction of sections similar to ours, and the construction of our Court is of course upon the section under consideration, and they show that in accord with well established legal principles, Courts may well hold that one class or kind of indebtedness may be included while another kind is obviously to be excluded from the operation of the section, and that too, when the general language used *might* apparently in terms cover all. If then reason, sense, logic and justice are to be invoked to find out what is or is not included, we submit that the case at bar calls for the exercise of these, since they are needed to prevent a construction now sought to be put upon the section, which must result in great public inconvenience and a great private wrong, and to save the section itself from being held to provide for absurdity in action, and impossibilities in execution on the part of County officials. Can it be possible that a County like Lake, with a debt far in excess of the limitation, if it applies to all debts, or to all debts other than those arising *ex delicto* or by judgment, with its rate of taxation, limited by Legislative enactment so that it exceeds by a very small amount, if any, the ordinary expenses of the County, shall be held utterly incapable of contracting in any way an indebtedness, though it may be that by thus limiting it, it can neither provide for the safety of the citizen, the holding of Courts or elections, or the keeping and maintenance of prisoners?

Can it be possible that the convention that made, or the people who adopted the Constitution intended that no debts for any purpose could be increased beyond the amount expressed in the section, without a vote of the people, when in the nature of the case no one could tell what the amount could be? Can it be true that in a case of emergency like that of the Leadville riot in 1880 (see record, fol. 70), the County being in debt to full amount of limitation, the authorities could not contract a debt by the employment of suitable agents to suppress the riot?

And, further still, can it be true that this alleged limitation having been reached, the county officers, though bound by oath and official bonds to faithfully discharge the duties of the office, must yet, despite the fact that their fees and salaries were fixed by legislative action, and that action provided for by the Constitution, shall yet be held to have no valid claim upon the county for such services? A construction that results in such absurd requirements and oppressive bearings upon the officers, and such unsafe and defenseless positions on the part of the public, surely cannot be a proper one, and up to this date, with one solitary exception, every Court called to pass upon the question, or a similar one, has so held. The Supreme Court of Missouri has, in two cases, covered the whole ground, holding, in the first case, Books vs. Earle, 87 Mo., 246, that a county could not contract a debt in excess of its current revenue without a vote of the people, where the purpose was to build, repair or improve the court-house. But that it could contract a debt in excess of the current revenue for the year without any vote, where the end for what the indebtedness was incurred was to pay the Sheriff of another county for the support and transportation of its prisoners, such keeping and transporting being provided for by law. And the opinion expressed in that case, and the reasons for it, as found in

Potter vs. Douglas Co., 87 Mo., 239, are so unanswerable that it seems to us that in the case at bar, where the language of section 6 is not so restricted as that in Missouri, the reasoning must hold good, and the result be the same. In that case the Court said:

"After carefully considering the subject, I am not of opinion that the constitutional prohibition should be ruled to apply in instances like the present. For this conclusion, these are my reasons: I do not regard section twelve, *supra*, as applying here, because the effect of such construction would be destructive of the peace and good order of every county embraced within the provisions of section 6090 aforesaid, for it would be an impossibility to submit to a vote of the people of the county concerned, the question of an unascertained and unascertainable indebtedness to be incurred in the future, as the exigencies of the case might demand. Who could foretell how many criminals would be arrested in the ensuing year? If this could not be done, is it not glaringly obvious that no question as to the amount of the indebtednesss could possibly be submitted to the people for the sanction of their suffrages? The maxim, *les non eogit ad imposibilia*, may appositely be invoked in the present case, a maxim equally invocable whether the law be statutory or organic. But another reason occurs why that section cannot apply in the case at bar. The inhibition of the Constitution, it will be observed, is leveled against a county becoming indebted, *i. e.*, through the ordinary channel, the action of the County Court, the financial agent of the county. But here the indebtedness was not so incurred. It was created entirely independent of any action of the County Court; created by the Sheriff of the county, pursuant to the command of section 6090, *supra*. The law itself gave license to the incurring of such a debt; it was incurred by operation of law, and the fact that the county would ulti-

mately have the debt to pay cuts no figure in this discussion."

See Record, p. 93.

Nor is this all; this Court, in the case of Fisk vs. Jefferson Police Judge, 116 U. S. 131, has recognized the underlying principle of these decisions when it held that where the law attaches a fixed compensation to a public office, a person filling the office is entitled to the compensation as by an implied contract, which could not be impaired by legislation. So in case at bar, the power to fix compensation having been expressly conferred on the Legislature, and it having been fixed by it in accordance with the Constitutional power thus given, the compensation can by no known rules of construction be taken away from such office, since the law and the Constitution in all parts must stand together if possible, and the construction is clearly possible and as we have seen, imperatively required to effectuate the end of both the Constitution and the laws, and County government. And such has been the holdings of the Supreme Court of California in the case of Welsh vs. Strothe, Auditor, 16 Pac. Rep. 22, where the Court held that the salaries of County officers fixed by statute was not included within the terms of a law which provided that the County authorities could not contract for or pay, in any one month, any demand against the treasury exceeding one-twelfth that allowed by law to be expended for the fiscal year. So, too, in Smith vs. Town of Dedham, 144 Mass. 177, it was held that a statute which provided that "cities and towns may, by ordinary vote, incur debts for temporary loan in anticipation of the taxes," etc., and by another section provided that "*other debts* than those mentioned in the preceeding section shall be incurred only by a vote of two-thirds of the voters present and voting at a town meet-

ing," could not be held to include *all* debts, and could not be held to inhibit contraction of debts necessary and convenient to the exercise of the corporate powers of such towns. In this case the Circuit Court has agreed with us and with the reasoning upon which we have proceeded, at least so far as to hold that *all* debts due by operation of law, or for fees and salaries provided for by the General Assembly, are not within the limitation, and to the opinions in the case, as found in the record, p. 85, we respectfully call attention. But as counsel for plaintiff in error has undertaken to point out certain errors that they conceive to exist, in that we notice them briefly. The first is, error in assuming it had any power or jurisdiction to overrule the Supreme Court of the State. Here, then, is an instance of discoveries made after judgment had, since neither on argument, nor in the record in this cause, was there, or is there any mention of this objection, and *in argumendo*, it was specially admitted that no point was made upon that. True, the question of jurisdiction may be raised at any time, and so, doubtless, counsel thinks it is not only "better late than never," but just as well now as ever, to which we assent, so far as questions of law are concerned, and we simply refer to the decisions of the Court on the point suggested.

Rowan vs. Runnels, 5 How. 134.
Pease vs. Peck, 18 How. 595.
Supervisors vs. U. S., 18 Wall. 71.

When no decision of the State Court had been had at the time constract was made, the Court decides in accordance with the legal rights of the parties, in accordance with the construction put on a statute by the officers who execute it.

Douglass vs. Co. of Pike, 101 U. S., 686.
Gudpoker vs. Dubuque, 1 Wall., 206.

Burgess vs. Seligman, 107 U. S., 33.
Green Co. vs. Commissioners, 109 U. S., 104.
Pana vs. Bowles, 107 U. S., 540.
Carroll vs. Smith, 111 U. S., 556.
Anderson vs. Santa Ann, 116 U. S., 759.
Boles vs. Brimfield, 120 U. S., 759.

But says counsel, neither pleadings nor proof show "*when* the plaintiff's right, if he has any, accrued." By reference to the record it will be seen, that date of warrant and date of presentation of warrant for payment is shown in the complaint, and the latest date is May 12, 1885, the complaint itself states the warrants issued between June 6, 1879, and May 15, 1885, (See Record folios 5 to 47), and the statement of facts admitted (folio 89) shows no objection, as the constitutional limitation was made prior to July, 1885, the suit in which decision was had, was an original proceeding in Supreme Court of the State and begun October 3, 1885, (see folio 99), and the suit at bar was brought February 2, 1887, and further it shows that the replication in this case set up the fact, that no county before defendant, ever raised the question of limitation of the constitution, and defendant county did not *until January* 8, 1886, ever at *any time make answer to any demand* on such warrants setting up Constitutional limitation," (See Record folio 101). In view of these admissions and pleadings, it would seem that counsel are as unmindful of facts as they are oblivious to the law, and more than that need not be said. Nor is the position that because counsel cannot find authority for issuing such warrants to bearer, plaintiff is not entitled to the decree of this Court, since, whether the authority was or was not given by the statute, the plaintiff in error has so construed it, ever since the act was passed, and never till now has it been questioned, and it is too late now to interpose a de-

fense, which we submit could never have been successfully urged. That this Court has jurisdiction when plaintiff is a citizen of another State and the instrument is payable to bearer is so well settled that we cite no authority, indeed, that is not denied, the counsels' contention being that the county authorities ought *not* to have issued the orders that way. Nor is counsel's attack on the reasoning of the Court below any better taken, when they attempt to show error in the Court's reasoning upon the class or kinds of indebtedness included, and within the limitation, since the State Court expressly admitted, as we have already seen, that involuntary liability or arising *ex delicto* is a subject that is not contemplated by the provision, (People vs. May, 9 Colo.), and the opinion of Court below is happily not to be sustained or overthrown on the *hap hazard* method of arguments to which counsel resort, a method that first assumes what is not shown by the language of a section, and then in support of the assumption refuses to look at, consider, or construe, any other section, and so ends in the absurdity of making one section of a Constitution destroy, or at least seriously impair all other sections.

Nor is their criticism as to the distinction, between contractual and compulsory obligations, or their assertion that "such distinction is of recent invention," worthy of discussion, since, though it must certainly detract from counsels' reputation as discoverers, it must still be said, that such distinction is neither of recent invention nor of unusual application, and still further, that in all these cases, where a duty is imposed by statute, for the public good, such as holding courts, providing for the public safety, holding of elections, etc., the obligations are compulsory, no matter whether it be expressed by *may* or *must*, and hence counsels' attempt at discriminating between obligations on the ground that the language used

does not necessarily imply compulsion, is like much of counsels' argument, alike unsupported by reason or authority.

But, says the counsel, we have the action and discussion of the Constitutional Convention. Admit it; yet there is nothing in the discussion that shows anything at variance with our position. It does not show the reason for using different language from that of other States, nor does it shed any light on the construction; but, even if it did, no Court has a right to give such discussion *much*, if, indeed, it can legally give it any, weight, for the rule, even as to the statutes, is, even if the discussion shows what was contemplated, Courts are not bound by it "unless fit words for the purpose were used."

1 P. Schooner Enterprise, 1 Pain., 35.

Little reliance ought to be placed on the diccussion of a bill in Congress.

Mitchell vs. Grant, W. M. & Co., 2 Story, 687.
9th Opinion Atty. Gen., 438 and 58.
Nicholson vs. U. S., Dev., 158.
Aldridge vs. Williams, 3 How., 24.

But, as we have already said, it is not the meaning or intention of the convention we must seek for, but the meaning and intention of the people who adopted it.

Cooley's Const. L., 80.
Taylor vs. Taylor, 10 Minn., 107.
Eakin vs. Raub, 12 Sergt. & R., 352.
Bank of Penn. vs. Commonwealth, 19 Penn. St., 156.
Southwark Bank vs. Commonwealth, 26 Penn. St., 450.
Lewis vs. Davis, 5 Nev., 409.

How the people understood it we know from the acts of all those who issued and took county warrants, for every man that trusted the county, and took warrants when the county was in debt, in excess of the limit, declared by action the sense in which he adopted these sections.

How they understood it from the time of its adoption, for at least nine years, we know, both from the acts of all officers who audited accounts and issued warrants, and by the acts of those who rendered service and accepted such warrants, when the county was in debt, in excess of the limit, and especially by the votes of a majority of the taxpayers, who voted to incur debts to the full amount of the limit for one purpose, while they had a large, already incurred debt for other purposes, and especially by the votes of those who voted to fund and issue bonds for debts which were largely in excess of the limitation, if the limitation included such debts, and by the acts of omission, as well as commission, of the General Assembly, since, while it did authorize the funding of such debts, it never, at any time, passed any act by which the question of incurring a debt for ordinary purposes could be voted on or submitted to a vote.

See Record, fol. 96.

Lastly we notice counsels' objection, that because judgment has been obtained, in a case where "many of the warrants sued on" were issued for services which the State could have required *without compensation*. Well admit it, what then? The State did not require it without compensation, it did pass laws by which parties were entitled to compensation, and even the Supreme Court of Colorado, People vs. May and Hall, 8 Colo., 491, has held that warrants such as these are evidences of indebtedness. Besides, even if this was not so, there is positively nothing in the record to show, any objections taken by plaintiff in error

at any time, to any warrant, on that ground, and, of course, no exception to any ruling relating to such objection; this, too, is an objection that is the fruit of counsel's afterthought; and as such is more than the proverbial straw, at which drowning men are always clutching, since here, there is not even a straw, by which plaintiff in error may hope to escape the payment of its debts. Nor is this argument backed up as it is attempted to be, by the decision of "our Supreme Court" in 9 Colo., 80—entitled to much consideration, since both argument and decision, is based upon the notion—that a stump speech made by a committee of the convention, issued in the shape of an "Address," and signed by the committee, explaining some parts of the Constitution, lauding others, and urging its adoption, was a "State paper," and an "authentic memorial of the time," the "value of which consists, not only in the general light it sheds upon the situation, but in the mention made of the section which we are considering and the article in which it occurs, and worse still because the Court, at least, by its own admission, did assign to the language used in the address, *value* as specific interpretation of the clauses and sections under discussion." Then it says: "We do not care to assign to the language we have quoted any undue value as a specific interpretation of the clauses in controversy." It is hard to see how any value could be given to the language of that committee, as a specific, or not specific, interpretation of the section, but it is clear that some value was given to it, and hence we have the anomaly of a Court assigning to certain general words, that neither give nor attempt to give any idea, as to whether one class or all kinds of debt were included in the limitation, a *value*—though *not* an undue value, as a specific interpretation of this section; and that because, as the Court says, the address "Has the scope and character of a State

paper issued to the people, by their chosen representatives in convention assembled." But the utter weakness of all this argument is, that these chosen representatives, were chosen to make a Constitution not to interpret it, there is *no word* even in this address that even suggests any interpretation of the Constitution on the points at issue.

The Court clinches its conclusions as follows: "What we submit as unquestionable is this, it (the address) discloses clearly an intention upon the part of the framers of the Constitution to guard against extravagance in the matter of County indebtedness," to which we say, well, suppose it does show such intention, since, as appears by the record, no extravagance in the matter of County indebtedness had ever been shown or claimed, as to the *ordinary* expenses of the Counties, at the time of the making of that address, fully one-half the Counties had no debts at all, and the others having no great amount, (see Record fol. 86) and some four Counties alone had an indebtedness of $84,050, for buildings, roads and bridges, which was more than one-half of the amount owing by all the Counties for ordinary debts, and five of them owed about $1,683,000, in railroad aid bonds, and since the Section as adopted certainly does speak of a distinct class of indebtedness, "by loan," and since that kind of indebtedness alone, is the only kind in which extravagance could have been claimed, it certainly is not to be inferred that they meant to limit all kinds of debts, but rather those only in which extravagance had been indulged, and in which, in the nature of things, it would be much more likely to be indulged thereafter, and so that this unquestionable intention to limit extravagance sheds no light upon the question under discussion, since the intention was much more probable to have been directed to known extravagance, rather than to that which was unknown and unapprehended. In conclusion we say, in our opin-

ion, since there is no claim or pretense that these warrants were not for claims against the County, audited and allowed by its officers for services honestly given, whose compensation was provided for and fixed by the Legislature under the express guarantee of the Constitution, and since the record shows that for ten years or nearly, all and everybody, whether officer, attorney or party earning the money, or tax payer voting to fund them, all and everybody taking such warrants and paying the taxes therewith, no one claiming them to be invalid, it would seem to be a palpable misuse of the *vox populi vox Dei* argument to apply it to a case of this kind, when even now but five out of forty-two of the Counties have ever sought to voice the sentiment of repudiation or to repudiate its votes, as plaintiff in error does, and if by this *vox populi* the counsel refers to it as expressed in the section under discussion, then we insist before this shall be regarded as *vox Dei*, it is but fair to listen to the people's voice when by vote, voice and act they showed their understanding to be such as to provide for the payment of honest debts, rather than to repudiate them, not to the voice of the few, and the few only, who are unwilling to pay any debt, whatever it may be.

We respectfully submit the judgment in this case should be affirmed.

WILLARD TELLER,
Attorney for Defendant in Error.

In the Supreme Court

Of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE,
Plaintiff in Error,
vs.
FRANK W. ROLLINS,
Defendant in Error.

No. 1347.

REPLY OF PLAINTIFF IN ERROR.

I.

It is conceded by counsel for defendant in error not only that the record, as printed, is correct, but that the statement of the facts of the case, as heretofore submitted by us, is sufficient for the purposes of this argument. The record (p. 52) recites as follows: "And this cause having heretofore come on to be tried by the court, *upon an agreed statement of facts, without a jury, pursuant to a written stipulation thereto herein filed*, and the court having *heard the same* and the arguments of counsel and taken the matter under advisement, and the court being now sufficiently advised in the premises, doth find for the said

plaintiff," etc. The record (p. 54) further recites as follows: "A jury being expressly waived by the parties to this cause, and thereupon the following proceedings were had on such trial herein, to wit: the said parties coming by their said attorneys respectively, produced, offered in evidence and submitted to said court on such trial as evidence thereon in this cause a statement, agreement and admission of facts in writing in *hæc verba*, to wit: * * * It is hereby, for the purposes of this action, stipulated that *the facts relating to this action* are as follows," etc. The bill of exceptions contained in the record (p. 84) further shows that the contention of the parties was for a judgment upon the law as applicable to the facts contained in this agreed statement. The record (pp. 54, 93, 94) shows that an exception was taken to the finding of the court, the judgment of the court, and the order of the court overruling a motion to vacate such judgment. This record sufficiently shows that there was a stipulation *in writing* waiving a jury. It declares that the cause came on to be tried by the court upon an *agreed statement of facts, without a jury*, pursuant to a *written stipulation thereto herein filed*, and this is sufficient. (Fleitas vs. Cockrem 101 U. S. 301). A stipulation *in writing* that a cause may be tried by the court is a waiver of a jury. (Bamberger vs. Terry 103 U. S. 40). And a stipulation in writing to submit a case on an agreed statement of facts is a sufficient waiver of a jury. (Wayne County vs. Kennicott 103 U. S. 554).

There is no room upon this record for the suggestion of counsel (Brief p. 2) that it does not sufficiently appear that the facts set forth in this agreed statement were "all the facts, or that the case was to be heard, or was heard, upon those facts alone." These record entries are not susceptible of the construction that evidence other than that contained in the agreed statement was introduced on

the trial of this cause. In United States vs. Eliason (16 Pet. 291) this court said: "At the period of the cession the practice is believed to have been well settled, both in Virginia and Maryland, that in trials at law where special or *agreed cases* have been made, they have been signed by counsel as representing their clients, and spread at large upon the record as a part thereof; *and as constituting the only legitimate ground for the action of the court, and as furnishing the regular and proper test to be applied by an appellate or revising tribunal to this action.*" The same view was taken, as to the force and effect of an agreed statement of facts, in Suydam vs. Williamson (20 How. 427) and Wayne County vs. Kennicott (103 U. S. 554). The agreed statement of facts has precisely the same effect as special findings of the court below, or a special verdict of a jury. In Wayne County vs. Kennicott (103 U. S. 554) the court said: "Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. It is manifest that the act of 1865 was not intended to interfere with this practice. The evident object of that legislation was to give special findings the same effect, for the purposes of a writ of error, as a special verdict or an agreed case. This record shows distinctly that the court was only required to determine whether in law, on the agreed facts, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, *is no more than a declaration that the court found the law to be in favor of the plaintiff on the case as stated.*" In the case before the court there was no finding of the facts, either general or special. The facts were agreed upon, and the court simply pronounced the judgment of law upon the facts. There is, therefore, no weight or point whatever in the

discussion of counsel relative to the effect of a general finding of a court upon issues of fact, made upon evidence presented to the court.

The judgment can derive no support from any facts not admitted by the pleadings or set forth in this agreed statement. Unless the judgment is correct upon the pleadings and facts as agreed upon, then it must be reversed. This is not a case where any presumptions are made in favor of the judgment. It makes no difference what questions of law were discussed, or whether there was any discussion in the court below. The range of discussion here is not limited by that entered upon in the court below. The entire law of the case, as it arises upon the pleadings and the admitted facts, is open both for renewed and for fresh discussion. No party to an action is ever concluded as to the law applicable to admitted facts. If this were not true then no attorney would be allowed to make a better argument in an appellate court than he made in the court below. This would be a hard rule in cases submitted without argument or where argument was limited. But there is nothing in the record to show that any argument or consideration now advanced by us was not advanced in the court below. We venture to take the position that when counsel are preparing an agreed statement of facts to submit to a court for final judgment thereon, they must see, at their peril, or the peril of their client, that sufficient facts are inserted therein, to justify, when considered in connection with the pleadings, a judgment in their favor, upon the law as it shall be finally declared to be. In such case, if the proper argument has not been made in the court below, or the proper theory of the law has not been there advanced, such argument and such theory may be made and advanced in the appellate court. But we submit that there is enough in the record to show that the plaintiff

in error relied, in the court below, on the first question presented in our opening argument.

It was necessary for the plaintiff below, in order to maintain an action on these warrants, to allege that he was the owner of them; and he did allege it. This allegation was denied throughout, and there is absolutely no proof on the subject. How can a judgment stand where all the evidence is before an appellate court, and there is no evidence, upon a vital point, to sustain the same? There was not only no proof to sustain the allegation of ownership, but there was no allegation, much less any proof, that plaintiff below ever became the holder of these warrants in such way as to enable him to maintain an action on them. We submitted in our opening argument, and we again present the point with confidence in its correctness, that no person, other than the original payees, can become the holder of warrants of this character, so as to maintain an action on them in his own name, without an assignment, by endorsement or otherwise, from such original payees. We cited a number of decisions from Illinois and California, based upon legislation similar to ours, to sustain this view; and, as our former argument upon this point has not been answered, we will not resume the discussion. We also submitted in our opening argument that the entire cause of plaintiff below was fatally defective in that the record shows that this action was instituted after the invalidity of these warrants had been adjudicated by the highest judicial tribunal of the state, and there is no allegation or evidence that the plaintiff acquired any interest in such warrants prior to such adjudication. This court has justified itself in overruling the highest court of a state in its construction of a state constitution on the ground that the right of a non-resident to invoke the independent judgment of the federal judiciary accrued prior to the decision of the

state court. This right could not exist where the instrument upon which action is brought is made payable to a citizen of the state who could not litigate in the federal court, and was not assigned to the non-resident until after the decision of the state court. This being so it is logically certain that the non-resident who seeks to attack a decision of the state court, must allege and show that he became the owner of such an instrument, by assignment or otherwise, from the original payee who is disabled from making such attack, prior to the adverse decision. We will not say that the very men who conducted the litigation in the state courts are the real owners of the warrants in suit, and have, since the adverse decisions in the state courts, merely used the name of a non-resident of the state, to renew the litigation and attack these state decisions, for this would be to go out of the record; but we do say that there is nothing in the record to show that this is not the case, and that it is incumbent on a litigant, thus asking that the state decisions shall be overthrown, to show when his right accrued. (Burgess vs. Seligman 107 U. S. 33; Bolles vs. Brimfield 120 *id.* 759). We therefore submit that, irrespective of any constitutional question, the judgment must be reversed, because (1) there is nothing to show that the plaintiff below is the owner of these warrants, (2) there is nothing to show that he ever became the owner of them by endorsement or assignment so as to enable him to maintain an action upon them in his own name, and (3) there is nothing to show that he acquired any interest in them prior to the decisions of the state court adjudicating their invalidity.

II.

The counsel for defendant in error contend that the only limitation prescribed by the constitution upon the contracting of indebtedness by counties is upon debts con-

tracted *by loan*. We have discussed this question in our opening argument (pp. 12–71) and have foreseen, and, we think, conclusively answered, all the arguments advanced by counsel to maintain their position; and we do not propose to repeat anything already sufficiently stated. The position of counsel assumes, and is entirely dependent for its correctness upon the assumption, that the clause prescribing a limitation of indebtedness *for all purposes* is *subordinate* to, and *dependent* upon, the opening clause of the section in which they are both contained. Upon this identical question the court, in People vs. May (9 Colo. 80) said: "Seeking the meaning of the framers of the constitution from the words they have used, and giving these words their plain and ordinary signification, it is a fair analysis of the section to say that it consists of two leading declarations of legislative will with exceptions to each: (1) That no county shall contract any debt by loan in any form, with the exceptions named. (2) That the aggregate amount of indebtedness of any county *for all purposes*, exclusive of debts contracted before the adoption of the constitution, shall not exceed at any time a certain rate, with an exception named. While these two propositions are associated, they are none the less *independent declarations*. Independent for the plain reason that there are no words giving to either clause the character of a *dependent or qualifying clause*. This stands confessed, when we are asked to supply a word giving to the latter clause the character of a *qualifying sentence*. True, we find the words 'shall not at any time exceed twice the amount above herein limited.' But these are words of *reference* for the purpose of adopting a rate of limitation; they in no wise qualify the language descriptive of the thing limited. The language used by the framers of the constitution expresses the meaning we have assigned it adequately, and with such precision as, in our opinion, leaves no room for reasonable

doubt. The construction given is based on the *plain terms* of the section." Upon this point the court below in this case (Rollins vs. Lake County 34 Fed. Rep. 845) said: "I have read the opinion of the supreme court on this matter, and studied it with care. The solid tread of the argument of the learned judge who wrote that opinion is to my mind irresistible. It compels conviction. Starting with the conceded and elementary proposition that, in determining the meaning of any instrument, whether agreement, statute or constitution, we look first to the words used, and seek their natural signification in the order of grammatical arrangement in which they are found, he shows that the sentences are *separate and complete*, the propositions in them *independent declarations*, and that there is no grammatical necessity of implying any word to perfect either. Hence the supplying or implying of a word must find some other reason than the mere grammatical arrangement for its justification. * * That which was their intent as shown by the grammatical arrangement of the language, and by their discussion, must, in a matter of this kind, be presumed to have been the intent of the people in adopting this constitution. The learned judge also notices other matters, such as the language of an address prepared by the convention, and submitted with the constitution to the people; but I do not care to pursue this matter further, or notice the various reasons urged by him in support of the conclusion. It is enough to say that I think his reasoning *unanswerable*." Every court, then, that has ever passed upon this constitutional provision has held that the clause limiting indebtedness *for all purposes* is a *separate and independent clause*, and must be construed precisely the same as though it stood *alone;* and we do not believe that any court can read and render the section in any other way.

The counsel for defendant in error, recognizing (as we

do) the principle that in the construction of a constitution we must look to the *history of the times* and examine the *state of things* existing when it was framed and adopted, in order to ascertain the old law, the mischief to be remedied and the nature and measure of the remedy intended, proceed, in the exercise of a fruitful imagination, to *manufacture history* to suit their case. An examination of the agreed statement of facts will show that a large amount of *trash* contained therein must have been inserted at the instance of counsel for defendant in error. We were standing upon the plain letter of the constitution, and were quite indifferent as to what counsel should spread upon the record, however immaterial or erroneous the same might be. Counsel now contend that the *history of the times* when the constitution was framed and adopted shows that there was no existing or threatened evil connected with the subject of public indebtedness, other than that of contracting indebtedness *by loan*. The agreed statement of facts contains nothing upon this subject. In reply to this *assumption* the court in People vs. May (9 Colo. 80) said: "We are not prepared to say that prior to the adoption of the constitution there had been no extravagance in the management of county affairs, or that there had been no improvidence in the matter of incurring county indebtedness in the nature of a floating debt. On the other hand, we think if the issue were submitted to a jury they might in all probability find the fact otherwise. But, if we concede the fact as claimed, the conclusion by no means follows." We invite the careful consideration of this court to what the supreme court (pp. 95–96) presents upon the basis of this concession; but it is the existence of the alleged fact itself that we are now considering. We deny the *assumptions and assertions* of counsel upon this subject, and submit that there is enough in the record to overthrow them. The great

evil of loaning credit and making donations in aid of the construction of railroads and other similar enterprises, by which loans would be contracted and bonds ordinarily issued, was absolutely prohibited and suppressed, so that nothing of this kind could have been in contemplation in prescribing a general limitation of county indebtedness for all purposes. In addition to this enough appears in the proceedings of the convention, and the address issued by the convention, to show that the principal purpose of this limitation was to *prevent extravagance* by counties in the administration of general public affairs. To that part of the argument of counsel for defendant in error which repudiates these proceedings and characterizes an address issued by the convention itself (not a mere committee) as a *stump speech*, we do not care to make any reply; it needs none. Counsel again undertakes to manufacture evidence or excite prejudice by declaring that not only the warrants in question, but all the warrants ever issued in Colorado, were issued in good faith, received in good faith and purchased in good faith by the persons who now attempt to enforce payment of them. We might meet this by alleging that a large part of the warrants issued in the years 1879, 1880 and 1881, by Lake county, were issued during a rule of extravagance and fraud that has no parallel in the history of this country, and that the present holders of such of these warrants as were not funded, and the holders of those which were funded, purchased them at about fifteen cents on the dollar, or two for a quarter according to the phrase of the time; but this would be to follow counsel outside of the record, and to engage in a discussion that is foreign to anything that can have any legitimate influence in arriving at a proper construction of the constitution.

All suggestions of counsel for defendant in error to the effect that the constitution, as construed by us, places a

limitation upon the power of contracting indebtedness that is *unreasonably restrictive*, are entitled to little, if any, consideration. This, at best, is a mere matter of opinion, and we deny that, in view of all the circumstances of the people of this state at the time of the adoption of the constitution, the rate established was too low. The provision excluded existing indebtedness; and the convention, in fixing the rate, undoubtedly took into consideration the fact, as shown by the agreed statement, that many of the counties were already *deeply indebted*. It was the intention beyond any possible doubt to adopt the general policy of requiring counties, and municipalities of all kinds, *to pay as they go*, as far as practicable; and to this end an unlimited power to raise money by *taxation* was recognized by the constitution. Upon this question the supreme court in People vs. May (9 Colo. 80) said: "We are told that otherwise the construction leads to an *absurdity*, in this, that the rate fixed is so low that county officials would be seriously *embarrassed and crippled* in the management of county affairs and unable to provide for the *ordinary expenses* of the county. It is a full answer to this to say that this is a limit of *indebtedness* and not a limitation of the amount that may be raised by *taxation* to meet the *necessary current expenses* of the county. It is simply a declaration that the county, within certain limits, shall live within its *income*, and not that its income shall be more or less. The limit of indebtedness fixed was a matter of judgment about which men might differ, and it is not for us to substitute our judgment for that of the convention. Having fixed a lawful margin of indebtedness, the intention was that the annual county tax should meet the annual county expenditure. * * * With this power to levy and collect taxes to meet the expenditure of a county during any fiscal year, we do not see how it can be said that a limitation on their power to

contract indebtedness can in any wise cripple them in the management of their county affairs. Some counties in the state have admittedly lived within the constitutional limitation; why have not all? Those which have lived within the limit, to that extent, prove its practicability. That it has been impracticable in any county does not affirmatively appear." Since the above decision was rendered there has been an authoritative and unequivocal declaration upon the part of the people of the state, through their representatives in the legislature, that these rates of indebtedness are not too low, and are not to be changed. By an act (Session Laws 1887 p. 27 Sec. 2) approved April 4, 1887, the legislature of the state submitted an amendment to section six of article eleven of the constitution. The amendment consisted of a proviso added to the section providing a mode by which the counties could validate indebtedness contracted in excess of the constitutional limit. *No change was made in the rates of indebtedness that could be contracted.* If there had been any practical inconvenience resulting from the constitutional limitation, as construed by the supreme court of the state, steps would have been taken by the legislature to change the same. The fact that the attention of the legislature was called to the subject, and, after consideration, the original section, so far as it went, was left precisely as it was before, is a conclusive argument to show that the people of the state regard the construction, given by the supreme court of the state, as being in harmony with their *intention* in adopting the constitution, and their *present judgment* respecting the *expediency* of the provision in question. As against this expression of public opinion the *frantic eloquence of interested subtlety* will expend itself without effect in its effort to convince this court that the wheels of government are going to stop (if they do not actually commence a backward revolution)

unless its construction is short, and. This action of the legislature should also be considered in determining whether there has ever been, as is claimed, any *general understanding, or contemporary construction* that is different from that given by the supreme court of the state in its several decisions, all of which were made prior to the *submission* of this amendment to the constitution. If there had been any understanding or construction such as is claimed by counsel for defendant in error, it would have been a very proper and natural proceeding, in submitting an amendment, to have so framed the provision as to have placed the constitution in harmony therewith.

A feeble effort is made by counsel for defendant in error—an effort that is characterized by *extravagant assertion* rather than argument—to show that our construction makes the constitution "commit *hari kari* and disembowel itself" and that we do not give sufficient consideration to provisions *in pari materia* with the one in dispute. As to the first of these contentions it is sufficient to say that we think we have already demonstrated, upon authority, that county government, provided for by article fourteen of the constitution, must be carried on in subordination to the *specific limitation* in question. Upon the latter question we have also presented our views in our opening argument (pp. 20–24), and, with reference to this same question, the supreme court, in People vs. May (8 Colo. 80) said: "It is further urged that in the other sections of the article there is no limit fixed to state, city or town indebtedness except indebtedness *by loan*. That the different sections are to be construed *in pari materia*. We do not care to construe these sections in any *final manner* in advance of cases presented under them and in the absence of full arguments respecting the effect of their provisions. It may be permitted us, however, to say that the correctness of the position taken is open to very great

doubt, if reference be had to other provisions of the constitution. By section eleven, article ten, taxation is limited to a certain rate. By section sixteen of the same article, expenditure is limited to the taxes raised. Taking the provisions of the two sections together, the intention would seem to be that the annual state tax should meet the annual state expenditure. Construing these two sections in connection with section three, article eleven, it would appear that no state indebtedness was contemplated except such as might be incurred under the provisions of section three. The difference lies in this, that a *stricter rule* is applied to the state than to the county. With regard to city or town indebtedness, it will be observed that section eight of the article, after providing for indebtedness *by loan*, declares that the 'aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent. of the valuation aforesaid.' If this is not a limitation of town and city indebtedness *in all forms*, it is upon the assumption that the existing indebtedness referred to is indebtedness *by loan*, a position, at best, very doubtful. But if it be true that there is no limitation of the aggregate amount of indebtedness for *all purposes* that the state may contract or that a city or town may contract, it would by no means follow that *a plain* limitation of the aggregate amount of indebtedness which a county could contract is to be disregarded." Shortly after this decision was rendered the court had occasion, in People vs. Scott (9 Colo. 422) to further construe some of the provisions of the constitution relative to the limitation of state taxation and state indebtedness, and did so in harmony with the former decision, the court saying: 'Constitutions are adopted as a whole, and it is a rule of construction applicable to them as well as to other instruments, that a clause or section which, standing by itself,

might seem of doubtful import, may be made plain and its true meaning discovered by comparison with other sections or clauses of the same instrument. * * * It has been repeatedly stated in the decisions of this court, on evidence deemed by us sufficient to justify the statement, that a *principal design* of the framers of the constitution, and of the people in adopting the same, was to inaugurate an *economical* state government, and, in order to carry out this purpose, limitations against *extravagance* in the administration of it were inserted. Now, with such a purpose in view, how *essentially unavailing* it would be to limit the rate of taxation as to *certain* governmental purposes and to leave it without restraint or limitation. as to *all other purposes* for which revenue may be provided. The *absurdity* of such a proposition is *patent on its face.*" This language was employed with reference to a limitation of taxation for state purposes, and it was held that it applied to *all state purposes.* There being no limitation of taxation for county purposes, the only safeguard against extravagance, either upon the part of the legislature or local officers, was in the limitation of indebtedness. As the one, in order not to be *essentially unavailing,* must be for *all purposes,* so must the other. Upon a survey, then, of the *entire constitution,* it is too plain for serious argument, that there was an intention to limit both taxation and indebtedness on the part of the state, and to limit indebtedness of counties, cities and towns; and that *all* these limitations were intended to be for *all purposes.*

III.

If the clause limiting indebtedness *for all purposes* is read and construed as a *separate and independent* declaration, then we submit that any attempt to draw a distinction between *contractual and compulsory* obligations is an attempt to *evade* the constitutional provision and not to

construe it. We have discussed this question, also, in our opening argument (pp. 71–111) and, upon reading the argument of counsel for defendant in error, find nothing new therein, and little that requires any reply. The claim that the constitution contemplates that there shall be a state, counties, cities, towns and school districts, with affairs necessitating expense in their administration, and that therefore a limitation upon the power to incur indebtedness for all purposes could not have been intended, leads to extreme absurdity. It practically negatives the feasibility of any limitation being placed by the people of a state upon public indebtedness. If there is any conflict between provisions of the constitution establishing counties, creating county offices and authorizing them to be compensated according to law for their services, and a specific limitation of indebtedness that could be incurred by counties for all purposes, the limitation would be enforced, for where there is an irreconcilable conflict between two provisions of a constitution the more comprehensive and specific provision will control. (Gulf etc. vs. Rambolt 67 Tex. 654). On the same principle where the bill of rights and the constitution differ, the latter is to be taken as the established limitation, or limited adoption of the general principles previously declared. (Baltimore vs. State 15 Md. 376; 3 Amer. & Eng. Ency. Law 680). It is a general rule that where a constitution enjoins a duty and furnishes the means of exercising the power necessary to the performance thereof, no other or different means can be implied, either on account of convenience, or of being more effectual. (Field vs. People 3 Ill. 79). The general powers given to the legislature to provide for the administration of county affairs are clearly hampered and qualified by a specific provision limiting the indebtedness of counties. (Book vs. Earl 87 Mo. 246). But there is no real conflict between this limitation clause and

any other provision of the constitution. The principal means furnished by the constitution to the legislative department for administering state and county affairs is the power of taxation, and this power, as to counties, is unlimited. No county, without legislative authority, would have any power to contract indebtedness, and hence the limitation is, to be effective, necessarily a limitation upon legislative power. We illustrated in our opening argument (pp. 88–92) the necessary and actual character of the legislation required and existing to enable counties to perform their functions in this state, and proved that practically no debt that could be incurred by a county is either absolutely compulsory or purely voluntary. Legislation sometimes assumes the form of command and at others that of permission. As a general thing the command would be without force or effect but for its being supplemented by the voluntary action of the county authorities. In many cases the counties are merely authorized to do things that are the most vital to the proper administration of public affairs. Counsel on the other side, in their brief (p. 44), maintain that, in all such cases, the word *may* means *must*. As counties can do nothing except that which they are required or permitted to do; as they exist and act only for the public good, and as the word *may* means *must* where the public good is involved, the consequence is, that all obligations incurred by a county are *compulsory*, and there is no constitutional limitation of indebtedness. This is the result of the argument of counsel and the decision of the court below. If this view obtains, the provision of the constitution in question is practically *nullified*

The counsel for defendant in error in their brief (pp. 36–37), and the court below in its opinion, attach great importance to the classes of adjudications which hold that *liability for torts* (Bartle vs. City of Des Moines 38 Iowa

414; Bloomington vs. Perdue 99 Ill. 329; Chicago vs. Sexton 115 Ill. 230) *and liability on judgments* (Railroad Co. vs. Osceola 45 Iowa 168; Same Case 52 Iowa 26; United States vs. New Orleans 98 U. S. 395) are not within the constitutional limitation. They seek to deduce from these adjudications a general proposition that constitutional limitations purporting to be *for all purposes* do not limit indebtedness for *all* purposes, and that, therefore, it is a mere matter of construction as to what indebtedness is limited, and what is not. No such general proposition is fairly deducible from any one of these adjudications, and the real principles actually involved in them are so plain that any thoughtful court or attorney should not be misled thereby. It is held, in these cases, that indebtedness is no defense to liability for a tort, on the same principle that insolvency would be no defense to liability for murder. The mere liability in such case is not a debt, and when the liability is merged in a judgment, it has become, like any other judgment, an absolute obligation. And, as to judgments upon obligations issued in excess of the constitutional limitation, the indebtedness *per se*, created by the judgment, is not considered one without the constitutional limitation, but is merely considered as an indebtedness that has assumed such absolute form, and is evidenced in such a manner, that no question as to whether it is within or without the limitation can be litigated or considered. When the minds of men who are engaged in administering justice, are so constructed as to lead them to conclude that because a man has made no defense to an action against him, it necessarily follows that he never had a defense, we may expect to see our judicial records blemished by just such judicial absurdities as the decision of the court below in this cause. It is contended by counsel that some such general principle is recognized in Fisk vs. Jefferson (116 U. S. 131), in Welsh vs. Strother

(16 Pac. Rep. 22) and in Smith vs. Town of Dedham (144 Mass. 177.) It requires but a casual examination of these cases to show that no such principle is recognized in any one of them.

The counsel for defendant in error have had inserted in the agreed statement of facts a large amount of data from which to deduce the conclusion that there has been given a certain kind of contemporaneous construction to this constitutional provision, and they devote considerable space in their argument to an effort to make such deduction appear reasonable and proper. In reply to this line of discussion the supreme court of the state, in People vs. May (9 Colo. 80) said: "A contemporaneous interpretation of this section by the first legislature after the adoption of the constitution is claimed. A subsequent *practical construction* of the section in some counties by the officers having to do with the law is also urged upon our notice. As to the first, we do not find in the statute referred to, the legislative interpretation contended for. As to the second, the practical construction by county authorities claimed has by no means been universal. *We cannot confine construction to cases where the provision has been violated.* A large majority of counties, as far as we are advised, have kept within the limit. Upon what grounds are we to say that the construction in such counties has been the same and not the reverse of that claimed? * * * And here we desire to say that we are unable to see how county authorities, having to deal with this provision, gave it any such construction as is contended for without the gravest doubts as to its validity. We think we keep closer to the fact to suppose that they acted *without their attention being called to the provision*, than to suppose that they *misunderstood its plain requirements*." It is difficult to understand precisely upon what facts or theory counsel claim that there has been any contemporaneous

construction. We infer, however, that it is to be deduced, if at all, from some or all of the considerations that some counties have violated the constitution; that some counties continue to pay warrants issued in excess of the limitation; that Lake county allowed several judgments to go against it without making the proper defense; that, upon a vote of the people, funding bonds were issued for an amount of indebtedness far beyond the limitation, and that the funding act and other legislation must have been had in recognition of indebtedness beyond such limitation. There is nothing in the record upon which to predicate any contention that any officer, board or legislative body, ever, as a matter of fact, actually considered, or placed any construction upon, this provision of the constitution. Violation is not construction. Disregard, either through wilfulness or ignorance, is not construction. A willingness to pay illegal warrants does not even tend to show construction. A failure to make defense does not tend to show that, upon a construction of the constitution, a conclusion was reached that no defense existed. The voting to issue funding bonds, nor the issuance thereof, do not amount to construction. There has been no legislation in this state that tends to show that this provision of the constitution was *construed*. The violation of the constitution resulted from a continuance of the system of contracting indebtedness without limit, as it existed under the territory. The constitution, when first adopted, was an entirely new instrument to the people of the state. That officers, in some of the counties, should proceed for some years, in ignorance of some of its provisions, would be expected. Constitutions and statutes may be habitually violated, and these violations may continue for a long period of time before any one raises a question under them. These violations may be wilful, or they may be com-

mitted in utter ignorance of the existence of the law. Every man is presumed to know the law for purposes of being amenable thereto, but, in determining a question of contemporary construction, no such general presumption can be made. *Practical construction* is a fact that is susceptible of proof. (1 Story Con. Secs. 405–408.) In all such cases as Stuart vs. Laird (1 Cranch 299), Martin vs. Hunter's Lessee (1 Wheat. 304, 351) and Cohens vs. Virginia (6 Wheat. 264, 418) the *fact of an actual construction* was made to appear. It does not appear in this case that, previous to the case of People vs. May (9 Colo. 80) any person had ever thought of actually construing this constitutional limitation as being confined to indebtedness *by loan;* and, it was not until after the decision in that case was rendered, that the counsel for defendant in error, casting about for some theory upon which to evade the same, and bringing to bear the "private lucubrations of the closet, or the retired speculations of ingenious minds" (1 Story Con. Sec. 408), evolved the supposed distinction between *compulsory* and *contractual* obligations. There can be no pretense that this distinction was ever thought of prior to its presentation in People vs. May (9 Colo. 414), much less that it was ever recognized by anything that would pass for *contemporary construction.* But, even if such a construction had been given, it could not prevail against the plain terms of the instrument. (3 Amer. and Eng. Ency. Law 678; People vs. Scott 9 Colo. 422.)

The counsel for defendant in error invoke many narrow and technical rules of construction which, however useful they may be on some occasions, have no place in the construction of constitutions and no applicability to the language to be construed. We have given these rules some consideration in our opening argument. (pp. 52–66). When it is once established that the clause of the constitution in question is a *separate and independent*

clause, the discussion is at an end, for "where the words are *plain and clear*, and the sense *distinct and perfect* arising on them, there is generally no necessity to have recourse to other means of interpretation." (1 Story Con. Sec. 401). In Gibbons vs. Ogden (9 Wheat. 188) this court, by Chief Justice Marshall, said: "The framers of the constitution, and the people who adopted it, must be understood to have employed words in their *natural sense*, and to have understood what they meant." But, as Mr. Cooley says, and as we see exemplified in the present case; "The attempt is made so often by *interested subtlety* and *ingenious refinement* to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare the *fundamental maxim*. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." (Cooley Con. Lim. 72). We will again quote the language to be construed: "*And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed*," *etc.* Does this mean the *aggregate* amount of debts? It says so. Does it mean that this indebtedness shall not *exceed* a certain amount? It says so. Does it mean that this limit includes indebtedness for *all purposes?* It says so. Is there anything doubtful or ambiguous about this language? Certainly not; a school boy can understand it. Can counsel by expatiating on the rule—*ejusdem generis*—and the maxim—*expressio unius est exclusio alterius*—and other rules and maxims characterized by the extremest refinement of subtlety, change or even *obscure* the *simple declaration* contained in this language? It says nothing about how or by whom debts

are contracted. It as plainly includes debts created by the legislature as it does those created by any other authority. As we have before seen there would be more reason, common sense and justice, in excepting from it debts created by the board of county commissioners than those created by legislative action. And we submit that the attempt to except from the operation of this constitutional provision all the various classes of warrants in suit is a proceeding that savors of *lawlessness*. As against any such unholy attempt we invoke the simple declaration of the constitution, and the *fundamental maxim* applicable thereto. (Opening Argument pp. 109–110; 3 Amer. & Eng. Ency. Law 679; McAdoo vs. Benbow 63 N. C. 464; Hills vs. Chicago 60 Ill. 86; Beardstown vs. Virginia 76 Ill. 34; People vs. Potter 47 N. Y. 375; Hawkins vs. Carroll Co. 50 Miss. 735; Chesapeake Etc. vs. Miller 19 W. Va. 408; Hamilton vs. County Court 15 Mo. 3; Kennedy vs. Gies 25 Mich. 83; People vs. Fanchu 50 N. Y. 288; Cronise vs. Cronise 54 Pa. St. 255).

If this high tribunal shall disregard this *fundamental maxim*, and, doing as the court below did, allow its eye to be *blinded to a clear vision of the literal mandate of the constitution*, then "*the people may well despair of ever being able to set any boundary to the powers of government.*" But, even if this court shall thus nullify the constitution and sanction the distinction recognized by the court below, still the judgment below must be reversed. When the court below closed its eye to the mandate of the constitution it seems to have also become oblivious to the entire record, and blindly proceeded to enter a judgment that cannot stand upon any theory of the law other than that the constitutional limitation is to be confined to debts *by loan*. If the provision is a limitation upon any other class of indebtedness then it certainly must include many of the warrants in suit. If there is any foundation for any

distinction by which some debts incurred by counties are *compulsory* while others are *contractual*, then, as we have pointed out in our opening argument (pp. 88–92), many of the warrants in suit were issued upon the latter class of obligations. The judgmeut was rendered precisely as though this provision of the constitution did not exist for any purpose. This alone demands a reversal of the judgment, but it is our desire that the constitutional questions involved and discussed shall be fully adjudicated.

DANIEL E. PARKS and
H. B. JOHNSON,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 1265

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, PLAINTIFF IN ERROR,

vs.

BENJAMIN GRAHAM, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF COLORADO, SITTING AT DENVER.

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WHIPPLE & PIERSON, LEGAL PRINTERS, DENVER, COLO., OCTOBER 6, 1888.

Transcript of Record.

Pleas. In the Circuit Court of the United States, sitting at Denver.

Be it remembered, that heretofore and on, to wit, Aug. 13th., A. D. 1884, came Benjamin Graham, by Robert E. Foot, Esq., his attorney, and filed in said court his complaint, and sued out of said court a writ of summons against the Board of County Commissioners of the County of Lake. And the said complaint is in words and figures as follows, to wit:

Complaint.

In the circuit court of the United States, for the district of Colorado.

BENJAMIN GRAHAM, Plaintiff,
v.
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, Defendants.

The plaintiff complains of the defendant and alleges:

1. That the plaintiff is a citizen and resident of the State of New York, and the defendant, the County of Lake, a body corporate and politic, duly organized and existing under and by virtue of the laws of the State of Colorado, and a citizen of said State, which by the laws thereof sues and is sued by the name as above in this complaint above entitled, and that the matter in dispute in this action exclusive of costs exceeds the sum of five hundred dollars.

And for a first cause of action, that on the 2d day of January, 1882, at the city of Leadville, in said county, the said defendant made and issued its certain bond, dated on said day and year,
1 and at said place, whereby, for value received, it promised twenty years from date, or ten years from date, at the pleasure of said defendant, to pay Rollins & Young, or bearer, one thousand dollars, at the office of the county treasurer, in the city of Leadville aforesaid, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder thereof, with interest payable semi-annually, at the office of said county treasurer, or at said banking house, at the rate of eight per cent. per annum, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. 108, series A, that thereto attached was, among others, a certain coupon, made by said county, on the day and at the aforementioned place, whereby it promised to pay to the bearer thereof forty dollars, at the office of said county treasurer, or at the said banking house, on the first day of July, 1883, for the interest then and there to be due on said bond, which coupon is in the words and figures following, to wit:

$40. $40.

"The County of Lake, in the State of Colorado, will pay the "bearer forty dollars, at the office of the County Treasurer, in the

"City of Leadville, or at the banking house of Jesup, Paton & Co., "in the City of New York, on the first day of July, 1883, being six "month's interest on funding bond No. 108, Series A.

"R. H. STANLEY, *County Treasurer.*

That before said coupon, by its terms became due and payable, the same came to and for value became the property of this plaintiff, who thereupon became and ever since has been, and still is its true and lawful owner and holder thereof; that when said coupon by its terms became due and payable, the same was duly presented to the banking house of Jesup, Paton & Co., in the City of New York,
2 one of the places of payment therein mentioned, and payment demanded but refused because said defendant had not, nor did it ever have funds at said place; that the said plaintiff has frequently thereafter, and in a friendly manner, applied to said defendant, at the banking house aforesaid, to pay said coupon, but it has refused so to do, notwithstanding it is justly thereon indebted to the plaintiff in the sum of forty dollars with interest thereon from the first day of July, 1883.

Note by Clerk: Here follows in original complaint, one hundred and ninety-seven causes of action, which are in all respects copies of the first cause of action, save as to the number and series of the bond to which the respective coupons, as set out in the several causes of action were attached, date due, and amount of cou-
3 pon, as set forth in the following schedule:

Signed, WILLIAM A. WILLARD, *Clerk.*

No.	Series.	Date Due	Amt
109	A	July 1, 1883.....	$40
110	A	July 1, 1883.....	40
111	A	July 1, 1883.....	40
112	A	July 1, 1883.....	40
113	A	July 1, 1883.....	40
114	A	July 1, 1883.....	40
115	A	July 1, 1883.....	40
116	A	July 1, 1883.....	40
117	A	July 1, 1883.....	40
118	A	July 1, 1883.....	40
119	A	July 1, 1883.....	40
120	A	July 1, 1883.....	40
121	A	July 1, 1883.....	40
122	A	July 1, 1883.....	40
123	A	July 1, 1883.....	40
124	A	July 1, 1883.....	40
125	A	July 1, 1883.....	40
126	A	July 1, 1883.....	40
127	A	July 1, 1883.....	40
128	A	July 1, 1883.....	40
129	A	July 1, 1883.....	40
130	A	July 1, 1883.....	40
131	A	July 1, 1883.....	40
132	A	July 1, 1883.....	40
133	A	July 1, 1883.....	40
134	A	July 1, 1883.....	40
457	B	July 1, 1883.....	20
524	C	July 1, 1883.....	4
525	C	July 1, 1883.....	4
526	C	July 1, 1883.....	4
138	A	January 1, 1884....	40
139	A	January 1, 1884....	40
140	A	January 1, 1884 ..	40
141	A	January 1, 1884....	40
142	A	January 1, 1884....	40
143	A	January 1, 1884....	40
144	A	January 1, 1884....	40
145	A	January 1, 1884....	40
146	A	January 1, 1884....	40
147	A	January 1, 1884....	40
148	A	January 1, 1884 ..	40
149	A	January 1, 1884....	40
150	A	January 1, 1884....	40
151	A	January 1, 1884....	40
152	A	January 1, 1884....	40
153	A	January 1, 1884...	40
154	A	January 1, 1884....	40
155	A	January 1, 1884...	40
156	A	January 1, 1884....	40
157	A	January 1, 1884...	40
158	A	January 1, 1884....	40
159	A	January 1, 1884....	40
160	A	January 1, 1884...	40
161	A	January 1, 1884...	40
38	A	January 1, 1884....	40
39	A	January 1, 1884...	40
40	A	January 1, 1884....	40
41	A	January 1, 1884....	40
42	A	January 1, 1884....	40
43	A	January 1, 1884....	40
44	A	January 1, 1884....	40
46	A	July 1, 1884.....	40
47	A	July 1, 1884.....	40
48	A	July 1, 1884.....	40
49	A	July 1, 1884.....	40

No.	Series.	Date Due.	Amt.
108	A	January 1, 1884....	$40
109	A	January 1, 1884....	40
110	A	January 1, 1884....	40
111	A	January 1, 1884...	40
112	A	January 1, 1884....	40
113	A	January 1, 1884...	40
114	A	January 1, 1884....	40
115	A	January 1, 1884....	40
116	A	January 1, 1884...	40
117	A	January 1, 1884....	40
118	A	January 1, 1884....	40
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120	A	January 1, 1884....	40
121	A	January 1, 1884..	40
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127	A	January 1, 1884...	40
128	A	January 1, 1884....	40
129	A	January 1, 1884....	40
130	A	January 1, 1884...	40
131	A	January 1, 1884....	40
132	A	January 1, 1884...	40
133	A	January 1, 1884...	40
134	A	January 1, 1884....	40
135	A	January 1, 1884...	40
136	A	January 1, 1884...	40
137	A	January 1, 1884...	40
45	A	January 1, 1884...	40
46	A	January 1, 1884....	40
47	A	January 1, 1884....	40
48	A	January 1, 1884...	40
49	A	January 1, 1884...	40
50	A	January 1, 1884....	40
51	A	January 1, 1884....	40
52	A	January 1, 1884....	40
53	A	January 1, 1884....	40
54	A	January 1, 1884....	40
55	A	January 1, 1884....	40
56	A	January 1, 1884....	40
57	A	January 1, 1884....	40
58	A	January 1, 1884....	40
456	B	January 1, 1884	20
457	B	January 1, 1884....	20
458	B	January 1, 1884....	20
524	C	January 1, 1884....	4
525	C	January 1, 1884 ..	4
526	C	January 1, 1884 ..	4
527	C	January 1, 1884...	4
528	C	January 1, 1884...	4
529	C	January 1, 1884...	4
38	A	July 1, 1884.....	40
39	A	July 1, 1884.....	40
40	A	July 1, 1884.....	40
41	A	July 1, 1884.....	40
42	A	July 1, 1884.....	40
43	A	July 1, 1884.....	40
44	A	July 1, 1884.....	40
45	A	July 1, 1884.....	40
127	A	July 1, 1884.....	40
128	A	July 1, 1884.....	40
129	A	July 1, 1884.....	40
130	A	July 1, 1884.....	40

No.	*Series.*	*Date Due.*	*Amt.*	*No.*	*Series.*	*Date Due.*	*Amt.*
50	A	July 1, 1884.....	$40	131	A	July 1, 1884.....	40
51	A	July 1, 1884.....	40	132	A	July 1, 1884.....	40
52	A	July 1, 1884.....	40	133	A	July 1, 1884.....	40
53	A	July 1, 1884.....	40	134	A	July 1, 1884.....	40
54	A	July 1, 1884.....	40	135	A	July 1, 1884.....	40
55	A	July 1, 1884.....	40	136	A	July 1, 1884.....	40
56	A	July 1, 1884.....	40	137	A	July 1, 1884.....	40
57	A	July 1, 1884.....	40	138	A	July 1, 1884.....	40
58	A	July 1, 1884.....	40	139	A	July 1, 1884.....	40
108	A	July 1, 1884.....	40	140	A	July 1, 1884.....	40
109	A	July 1, 1884.....	40	141	A	July 1, 1884.....	40
110	A	July 1, 1884.....	40	142	A	July 1, 1884.....	40
111	A	July 1, 1884.....	40	143	A	July 1, 1884.....	40
112	A	July 1, 1884.....	40	144	A	July 1, 1884.....	40
113	A	July 1, 1884.....	40	145	A	July 1, 1884.....	40
114	A	July 1, 1884.....	40	146	A	July 1, 1884.....	40
115	A	July 1, 1884.....	40	147	A	July 1, 1884.....	40
116	A	July 1, 1884.....	40	148	A	July 1, 1884.....	40
117	A	July 1, 1884.....	40	149	A	July 1, 1884.....	40
118	A	July 1, 1884.....	40	150	A	July 1, 1884.....	40
119	A	July 1, 1884.....	40	151	A	July 1, 1884.....	40
120	A	July 1, 1884.....	40	152	A	July 1, 1884.....	40
121	A	July 1, 1884.....	40	153	A	July 1, 1884.....	40
122	A	July 1, 1884.....	40	154	A	July 1, 1884.....	40
123	A	July 1, 1884.....	40	155	A	July 1, 1884.....	40
124	A	July 1, 1884.....	40	156	A	July 1, 1884.....	40
125	A	July 1, 1884.....	40	157	A	July 1, 1884.....	40
126	A	July 1, 1884.....	40	158	A	July 1, 1884.....	40
159	A	July 1, 1884.....	40	524	C	July 1, 1884.....	4
160	A	July 1, 1884.....	40	425	C	July 1, 1884.....	4
161	A	July 1, 1884.....	40	526	C	July 1, 1884.....	4
456	B	July 1, 1884.....	20	527	C	July 1, 1884.....	4
457	B	July 1, 1884.....	20	528	C	July 1, 1884.....	4
458	B	July 1, 1884.....	20	529	C	July 1, 1884.....	4

Wherefore, the plaintiff demands judgment against the defendant for the several sums so due and unpaid as above stated, which in the aggregate amounts to the sum of seven thousand two hundred and eighty (7,280) dollars, with interest on the sum of one thousand one hundred and twelve (1,112) dollars from the 1st July, 1883, on the sum of three thousand and eighty-four (3,084) dollars from the first of January, 1884, and on the sum of three thousand and eighty-four (3,084) dollars from the first of July, 1884, and the costs of this action.

Signed, ROBT. E. FOOT, *Attorney for the plaintiff.*

Endorsement:

No. 1591. United States circuit court. Benjamin Graham against the Board of County Commissioners of Lake county. Complaint, filed Aug. 13, 1884. Edward F. Bishop, *Clerk*, Robert E. Foot, *Attorney for plaintiff.*

And said summons is in the following words and figures, to wit:

Summons.

In the circuit court of the United States, for the district of Colorado.

UNITED STATES OF AMERICA, *District of Colorado.* } ss:

BENJAMIN GRAHAM
v.
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE.

Complaint filed in the clerk's office, this 13th day of August, A. D. 1884.

The President of the United States of America, to the
8 Board of County Commissioners of the county of Lake, greeting:

You are hereby notified that an action has been brought in said court, by Benjamin Graham, plaintiff, against you as defendant, to recover the sum of $7,280 due from you, the said defendant, to the said plaintiff on 198 coupons, being for interest on certain bonds issued by defendant January 2d, 1883, payable to Rollins & Young or bearer, and bearing interest of 8 per cent. per annum, as shown by the coupons attached to said bonds, as more fully set out and described in the complaint, filed herein and to which reference is here made. Together with interest on said sum as follows, to wit: On $1,112 thereof from July 1st, 1883; on $3,084 thereof from January 1st, 1884; and on $3,084 thereof from July 1st, 1884, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days, (exclusive of the day of service) after this summons shall be served on you, if such service shall be made in the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of said complaint, for said sum of $7,280, interest as aforesaid and costs.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 13th day of August, A. D. 1884, and of the independence of the United States the 109th year.

Signed, EDWARD F. BISHOP, *Clerk*,
9 [SEAL] By *Deputy Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, *August* 16, A. D. 1884.

I hereby certify that I received the within writ on the 13th day

of August, A. D. 1884, and that I have personally served the same upon said defendant, the Board of County Commissioners of the county of Lake, by delivering to Frank M. Reardon, clerk of said the Board of County Commissioners of the county of Lake, and the clerk and recorder of Lake county, state of Colorado, personally a true copy of the within writ, at Leadville, county of Lake, on the 15th day of August, A. D. 1884.

(Signed) WALTER A. SMITH, *Marshal.*
By JOHN W. BELCHER, *Deputy Marshal.*

Endorsement:

No. 1591. Circuit court of the United States for the district of Colorado. Benjamin Graham, plaintiff, vs. The Board of County Commissioners of the County of Lake, defendant. Summons, filed this 16th day of August, A. D. 1884. Edward F. Bishop, Clerk. By F. W. Tupper, Deputy Clerk. Robert E. Foot, of Denver, attorney for plaintiff.

And afterwards, and on, to wit, the 5th day of May, A. D. 1885, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his amendment to the complaint heretofore filed herein. And the said amendment to complaint is in words and figures as follows, to wit:

Amendment to Complaint.

10 U. S. Circuit Court, District of Colorado.

BENJAMIN GRAHAM
v.
THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY.
} *Amendment to Complaint.*

The plaintiff, by way of amendment to the complaint filed in this cause, alleges:

That the bonds and coupons attached thereto, set out in said complaint in the several causes of action therein, were duly issued by said defendant under and by virtue of an act of the general assembly of the state of Colorado, entitled "An act to enable the several counties of the state to fund their floating indebtedness," approved February 21, 1881, which said act granted and gave the authority under which the defendant issued the said bonds and coupons, and that the same were a part of a series of bonds and coupons issued by the defendant to fund its floating indebtedness in accordance with the requirements of said act.

(Signed) ROBERT E. FOOT.

Endorsement:

No. 1591. U. S. Circuit Court. Benjamin Graham vs. The Board of County Commissioners of Lake County. Amendment to complaint. Robert E. Foot, Att'y for Plff. Filed May 5, 1885. Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 9th day of May, A. D. 1885,

came the said defendant, by Johnson & Parks, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein, and the said answer is in words and
11 figures as follows, to wit:

Amended Answer to Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States, held at Denver, within and for said district.

BENJAMIN GRAHAM, *Plaintiff,*
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, *Defendant.* } *Answer.*

I.

The above named defendant answers the complaint of plaintiff herein, and for a first defense thereto alleges, that it did not undertake or promise in the manner or form as the said plaintiff has in his said complaint complained, and of this the said defendant puts itself upon the country by

DAN'L E. PARKS,
County Attorney,
H. B. JOHNSON,
Def'ts Attys.

II.

And for a separate and second defense to this action, the defendant further answering further alleges that none and not one of the supposed bonds, or coupon or coupons, alleged to be or have been thereto attached, or any or either of them, in the
12 several counts and causes of action of the said complaint mentioned, was or were ever made, executed, issued or delivered by the said defendant, or the said Board of County Commissioners, by lawful power or authority under or in pursuance of an act of the Legislature of the State of Colorado, entitled "An Act to enable the several Counties of the State to fund their floating indebtedness," approved February 21, A. D. 1881, or law of said State of Colorado, or for any of the purposes allowed by law, by reason of which the defendant is not obligated thereby, and said bond or bonds, and each of them, are absolutely void and of no force or effect whatever as against the defendant; of all which the plaintiff had in due time due notice, and said plaintiff is not now, and never was, a *bona fide* purchaser or holder of any of said bonds or coupons for value, without notice of the premises alleged

herein, by reason whereof the said plaintiff ought not to have and maintain this action against the said defendant.

(Signed), DAN'L E. PARKS,
County Attorney,
H. B. JOHNSON,
Attys. for Deft.

And defendant denies that said bonds, or coupons attached thereto, set out in said complaint in the several causes of action therein, or any or either of them, were duly or otherwise issued by defendant and under or by virtue of an act of the General Assembly of the State of Colorado, entitled "An Act to enable the several Counties of the State to fund their floating indebtedness," approved February 21, A. D. 1881; and defendant denies that said act or any other act of said General Assembly granted or gave the authority under which the defendant lawfully issued the said alleged bond or bonds, or coupons, or any or either of them, or any part thereof. (Signed), D. E. PARKS,
County Attorney,
H. B. JOHNSON,
Def'ts. Attys.

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III.

And for a third and separate defense to this action the defendant further answering further alleges, that none of the said supposed bond or bonds, or the alleged coupon or coupons thereto attached, alleged and set forth in the several counts and causes of action of the said plaintiff's complaint were, at any time, ever delivered to the plaintiff, nor did they, or any or either of them, or any part of them, ever, at any time, become the property of the plaintiff, nor is the said plaintiff now, nor was he ever at any time the lawful possessor thereof, nor are the said bonds or coupons, or any or either of them now, nor were they ever at any time heretofore the property of the plaintiff, nor is the plaintiff, nor was he ever, at any time, the owner of any or either of said bond or bonds, or the coupon or coupons thereto attatched, or any part thereof, mentioned and described in said complaint, and that none of said bonds or coupons were ever assigned or transferred to him, the said plaintiff, by the payee thereof, by reason whereof the said plaintiff is not the real party in interest in this action.

And defendant further alleges, that it is not now, and was not when this action was brought, indebted to the plaintiff in any sum or sums of money whatever on account of the said supposed bond or bonds, or the supposed coupon or coupons aforesaid, or any of them, or any part thereof, either for principal, interest or otherwise. And of this the defendant is ready to make due proof.

Wherefore, it prays judgment that it go hence hereof without day and recover its costs of this action by

(Signed), DAN'L E. PARKS,
County Attorney,
H. B. JOHNSON,
Deft's. Attys.

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IV.

And for a fourth and separate defense to this action the defendant further answering further alleges, that each and every of the said bonds, and the said supposed coupons, alleged to be or to have been thereto attached, mentioned and set forth in the several counts and causes of action of the said complaint, was made and issued and the debt and obligation thereof contracted by said defendant in direct violation and contravention of Section six (6), Article eleven (11), of the Constitution of the State of Colorado, in such case made and provided, and at a time when a limitation of the aggregate amount of debt or indebtedness which could be contracted or incurred by the defendant for all purposes, as prescribed by said constitutional provision, had been reached and exceeded by defendant, by reason of all which the said bonds and coupons, and each and every of them, are absolutely void and of no obligatory force or effect upon the defendant, of all which plaintiff had at all times due notice; and said plaintiff is not a *bona fide* purchaser or holder, for value, of any of said bonds or coupons without notice of the premises herein alleged. (Signed), DAN'L E. PARKS,
County Attorney,
H. B. JOHNSON,
15 *Deft's Attys.*

UNITED STATES OF AMERICA,
District of Colorado,
STATE OF COLORADO,
Lake County, } ss.

Daniel E. Parks, being duly sworn, says he is the County Attorney of the County of Lake, the defendant in the foregoing and annexed answer, and duly authorized to make defense to this action.

That said defendant is a governmental corporation and body politic of said State, organized and existing under and by virtue of the laws of said State. Deponent further says that he has read the within and foregoing answer, and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

(Signed), DANIEL E. PARKS.

Subscribed and sworn to before me, this 2d day of May, A. D. 1885.
(Signed), J. H. PLAYTER, *Clerk District and Lake County.*
[SEAL.] By THO. W. LEONARD, *Deputy Clerk.*

No. 1591. United States Circuit Court, District of Colorado. Benjamin Graham, Plaintiff, against the Board of County Commissioners of the County of Lake, defendant. Amended answer filed May 9th, 1885. Edward F. Bishop, Clerk. Johnson & Parks, De-
16 fendant's Attorneys.

And afterwards, and on, to wit: the 9th day of June, A. D. 1885, came again the said plaintiff by his attorney aforesaid, and filed in said Court, and in said cause his replication to the amended an-

swer heretofore filed herein. And the said replication is in words and figures as follows, to wit:

Replication.

UNITED STATES CIRCUIT COURT, }
District of Colorado. }

BENJAMIN GRAHAM, }
v. }
THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY. } *Replication.*

The plaintiff replies to the fourth defense of the amended answer of the defendant herein and alleges:

That the bonds and coupons attached thereto set out in the complaint herein, were made and issued and the debt and obligation thereof contracted in conformity with the provisions of section six, article eleven (11) of the constitution of the State of Colorado, and that the limitation of the aggregate amount of debt or indebtedness which could be contracted and incurred by said defendant under said constitutional provision was not reached and exceeded by said defendant in the issue of said bonds and coupons, and said bonds and coupons are valid and of full force and effect under said
17 constitutional provision and irrespective of the same.

(Signed), ROBT. E. FOOT, *Attorney for Plaintiff.*

STATE OF COLORADO, }
County of Arapahoe, } ss.

Robert E. Foot, being duly sworn, says he is attorney for the plaintiff herein, that he has read the foregoing replication, and that the same is true of his own knowledge.

(Signed), ROBERT E. FOOT.

Subscribed and sworn to before me, this 9th day of June, 1885.

Endorsement:

No. 1591. United States Circuit Court. Benjamin Graham vs. The Board of County Commissioners of Lake County. Replication. Robert E. Foot, Attorney for Plaintiff. Filed June 9th, 1885. Edward F. Bishop, Clerk.

And afterwards, and on, to wit: the 8th day of May, A. D. 1888, the same being one of the regular judicial days of the May term, A. D. 1888, of said Court, present the Honorable David J. Brewer, Circuit Judge, the following further proceeding was had and entered of record, in said Court, and in said cause, to wit:

Order, Finding and Judgment.

BENJAMIN GRAHAM,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, } *Money Demand.*

18 At this day comes the said plaintiff, by R. E. Foot, Esq., and the said defendant, by D. E. Parks, Esq., its attorney, also comes.

And this cause having heretofore come on to be heard, tried by the Court, upon an agreed statement of facts, without a jury, pursuant to a written stipulation thereto herein filed, and the Court having heard the same, together with the arguments of counsel and taken the matter under advisement, and the Court, being now sufficiently advised in the premises doth find for the said plaintiff and assess his damages at seven thousand seven hundred and eighty-seven dollars and eighty-five cents ($7,787.85).

To which finding by the Court, the said defendant by its said attorney excepts.

Wherefore it is considered by the Court, that judgment be entered herein, in favor of the said plaintiff and against the said defendant, for the said sum of seven thousand seven hundred and eighty-seven dollars and eighty-five cents ($7,787.85), and the said plaintiff's costs to be taxed. To the entry of said judgment the said defendant in due form and manner duly excepted.

And thereupon, and on the same day, to wit: the 8th day of May, A. D. 1888, judgment was duly entered against the said defendant in judgment book of said Court, in pursuance of the statutes and rules of Court. And the said judgment is in words and figures as folows, to wit:

Judgment.

BENJAMIN GRAHAM,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE. } *Money Demand.*

19 On this 8th day of May, A. D. 1888, the same being one of the regular judicial days of the May term of A. D. 1888, of said Court, there being present the Honorable David J. Brewer, Circuit Judge:

It is considered by the Court that the said plaintiff do have and recover of and from the said defendant seven thousand seven hundred and eighty-seven dollars and eighty five cents ($7,787.85), his damages by occasion of the premises in its complaint mentioned, in form aforesaid assessed and his costs by him in this behalf laid out and expended, to be taxed.

And afterwards, and on to wit: the 30th day of June, A. D. 1888, the same being one of the regular judicial days of the May term, A. D. 1888, of said Court, present the Honorable David J. Brewer, Cir-

cuit Judge, the following further proceeding was had and entered of record in said Court and in said cause, to wit:

Order.

Motion to vacate judgment and grant new trial denied.

BENJAMIN GRAHAM
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE. } *Money Demand.*

At this day, comes the said plaintiff by Willard Teller, Esq., his attorney, and the said defendant, by D. E. Parks, Esq., its attorney, also comes.

And the motion of the said defendant to vacate the judgment lately had herein, and for a new trial of the issues herein, having heretofore come on to be heard and having been submitted to the Court and by the Court taken under advisement, and the Court being now sufficiently advised in the premises, it is ordered by the Court for good and sufficient reasons to the Court appearing, that the said motion be denied.

And thereupon the said defendant excepts to the said order and ruling of the Court.

And afterwards, and on to wit: the 5th day of July, A. D. 1888, came again the said defendant, by its attorney aforesaid, and filed in said Court and in said cause its bill of exceptions reserved by it upon the trial of this case. And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, } ss.
District of Colorado, }

In the Circuit Court of the United States of the Eighth Judicial Circuit of the United States, held at Denver, Colorado, within and for said District.

BENJAMIN GRAHAM, *Plaintiff,*
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *Defendant.* } No. 1591.

Bill of Exceptions.

Be it remembered, that in the term of November, in the year of our Lord one thousand eight hundred and eighty-four, and on, to wit, the 13th day of August, A. D. 1884, came Benjamin Graham, plaintiff, by Robert E. Foot, Esq., his attorney, into the said Circuit Court, before the Judges thereof, and impleaded the Board of County Commissioners of the County of Lake, Colorado, in a certain plea and complaint in debt upon promises, on which the said Benjamin Graham complained and declared against the said Board

of County Commissioners of the County of Lake, as alleged and set forth in the said plaintiff's complaint made, filed and of record in this cause fully appears, to which complaint and declaration the said Board of County Commissioners of the County of
22 Lake, defendant, did, on, to wit, the 9th day of May, A. D. 1885, appear in said cause and Court, by its attorney, Daniel E. Parks, Esq., and make and file answer to the allegations of the said complaint, as alleged and set forth in the said defendant's answer made, filed and of record in this cause; to which answer, on the 9th day of June, A. D. 1885, the said Benjamin Graham, plaintiff, did, by his said attorneys, further appear in said cause and Court and make and file in said cause his replication thereto, as alleged and set forth in the said plaintiff's replication made, filed and of record in this cause fully appears.

And thereupon issue was joined between the said Benjamin Graham, plaintiff, and the said Board of County Commissioners of the County of Lake, Colorado, defendant.

And afterwards, to wit, on the 12th day of January, 1888, before said Court, at the sitting thereof at the November term, A. D. 1887, held at Denver, aforesaid, before the Honorable David J. Brewer, Circuit Judge of the United States of said Circuit, appointed to hold said Court according to the form of the statute in such case made and provided, the aforesaid issue so joined between said parties aforesaid came on to be tried by and before said Court and said said Judge presiding, a jury being expressly waived by the parties to this cause, and thereupon the following proceedings were had on such trial herein, to wit: The said parties coming by their said attorneys, respectively, produced, offered in evidence and submitted to said Court on such trial as evidence thereon in this cause a statement, agreement and admission of facts in writing, in
23 *hæc verba*, to wit:

In the Circuit Court of the United States, District of Colorado.

BENJAMIN GRAHAM, *Plaintiff*,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, *Defendant*.

Agreed Statement of Facts.

To the Honorable DAVID J. BREWER, Judge of said Court, and to the said Court and the Judges thereof:

The parties to this suit, through their respective counsel, agree to the following statement of facts, to wit:

1st—That this cause may be tried before his Honor, David J. Brewer, without a jury, a jury being hereby waived.

2nd—That the plaintiff, Benjamin Graham, is a citizen of the State of New York, and the defendant a citizen of the State of Colorado, with authority to sue and be sued under the name of the Board of County Commissioners of the County of Lake.

3rd—That in compliance with an act of the General Assembly of the State of Colorado, entitled "An Act to enable the several Counties of the State to fund their floating indebtedness," approved February 21, 1881, the defendant, on the second day of January, 1882, made, executed and delivered to divers persons, at that time holding warrants of the said County of Lake, certain bonds of said County, in exchange for such warrants, which said bonds
24 were in words and figures following, to wit: (But the defendant County does not admit that said bonds were valid, but on the contrary claim the same were invalid under the Constitution of the State of Colorado, Section 6 of Article 11, and for that reason were never issued in compliance with said act nor executed or delivered thereunder.)

No. ———. $———.

United States of America. County of Lake. State of Colorado.
Funding bond.

Series ———.

The County of Lake, in the State of Colorado, acknowledges itself indebted, and promises to pay to ——————————— or bearer, ——————— dollars, lawful money of the United States for value received, redeemable at the pleasure of the said county, after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of the said county, in the city of Leadville, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on the first day of January and the first day of July in each year, at the office of the county treasurer aforesaid, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of 710 funding bonds, each of like date, comprised in three series, designated "A," "B" and "C" respectively; series "A" consisting of 450 bonds for the sum of one thousand dollars each, numbered from 1 to 450, both numbers inclusive; series "B" consisting of 60 bonds, for the sum of five hundred dollars each, numbered from 451 to 510, both numbers inclusive; and series "C" consisting of 200 bonds for the sum of one hundred dollars each, numbered from 511 to 710, both numbers inclusive, the whole amounting to five hundred thousand dollars, which the Board of County Commissioners of said Lake County have issued under and by virtue of and in full compliance with an act of the General Assembly of the State of Colorado, entitled "An Act to enable
25 the several Counties of the State to fund their floating indebtedness," approved February 21st, 1881; and it is hereby certified that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond. It is further certified that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of

said County of Lake, voting on the question at a general election duly held in said county on the 8th day of November, A. D. 1881.

The faith and credit of the County of Lake are hereby pledged for the punctual payment of the principal and interest of this bond.

In testimony whereof the Board of County Commissioners of the said county of Lake has caused this bond to be signed by its chairman, countersigned by the county treasurer, and attested by the county clerk, under the seal of the county, this second day of January, A. D. 1882.

Attest, ————————

County Clerk.

[COUNTY SEAL.] ————————

Chairman Board of County Commissioners.

4th—That the said bonds were made, executed and delivered in three series, and for the sums designated in the body of the bond, after being signed and attested by Joseph H. Wells, the County Clerk of said County of Lake, and signed by Joseph Pearce, then Chairman of the Board of County Commissioners of said county, and countersigned by R. H. Stanley, the County Treasurer of said county, and attested and attached thereto the seal of said county.

5th—That there was attached to each of said bonds forty coupons, to wit, to series "A" forty coupons of forty dollars each; to series "B" forty coupons of twenty dollars each; and to series
26 "C" forty coupons of four dollars each; that said coupons were in the following form, to wit:

$———— The County of Lake, $————
In the State of Colorado,

Will pay the bearer ———————— dollars at the office of the County Treasurer, in the city of Leadville, or at the banking house of Jesup, Paton & Co., in the city of New York, on the 1st day of ————————, 18——, being six months interest on funding bond.

No. ———— (Series ——) ————————

County Treasurer.

6th—That said coupons were signed by R. H. Stanley, the County Treasurer of said county, corresponded in number with the number of the bond to which it was attached, showed the date when the same became due, the amount of interest called for by the coupon, and was made a part of and delivered with said bonds, which bonds, with coupons so attached before the same were issued and delivered as aforesaid, were registered in the office of the State Auditor, as required by said act.

7th—That the plaintiff, Benjamin Graham, at the time this suit was commenced, and before said coupons became due, was and now is the owner and holder, and is entitled to the possession of the following coupons attached to, issued with and a part of said series, and involved in and set out in the complaint in this suit, to wit:

ber, A. D. 1881, a petition in writing, signed by more than fifty of the qualified electors of said Lake County who had paid taxes upon property assessed to them in said County in the preceding year, was presented to said Board of County Commissioners, praying said Board to publish for the period of thirty days in some newspaper published within the said County a notice requesting the holders of the warrants of said County to submit in writing to the Board of
County Commissioners, within thirty days from the date of
31 the first publication of such notice, a statement of the amount of the warrants of said County which they would exchange at par and accrued interest, for the bonds of the said Lake County, to be issued under the provisions of an act entitled "An Act to enable the several Counties of the State to fund their floating indebtedness," approved February 21, 1881, taking such bonds at par; and

Whereas, in accordance with such petition, and in pursuance of the provisions of the act aforesaid, such notice was duly published on the seventh day of September, A. D. 1881, and continued for the period of thirty days, in the Leadville Daily Herald and the Leadville Daily Democrat, both newspapers being published within said Lake County; and

Whereas, in response to such published notice the said Board of County Commissioners have received statements from holders of the warrants of said Lake County to the amount of five hundred thousand dollars, which the said holders agree to exchange at par and accrued interest for the bonds of said Lake County, to be issued under the provisions of the act aforesaid, taking such bonds at par; and

Whereas, a further petition in writing, signed by more than fifty of the qualified electors of said Lake County who had paid taxes upon property assessed to them in said Lake County in the preceding year, was presented to said Board of County Commissioners at their regular meeting, duly held October 3, 1881, praying said Board to submit to the vote of the qualified electors of said Lake County, at the general election to be held in said County on Tuesday, the eighth day of November, A. D. 1881, the question whether
the said Board of County Commissioners shall issue bonds of
32 said Lake County, under the provisions of the act aforesaid, in exchange at par for the warrants of said Lake County issued prior to the date of the first publication of the aforesaid notice, to wit: the seventh day of September, A. D. 1881; and

Whereas, in accordance with said last named petition, and in pursuance of the provisions of the act aforesaid, public notice was duly given for the period of thirty days by publication in the Leadville Daily Herald and the Leadville Daily Democrat, both newspapers being published in said Lake County, that at the general election, occurring on Tuesday, November 8, A. D. 1881, such question of funding the County indebtedness would be submitted to the vote of the duly qualified electors of said Lake County who had paid taxes upon property assessed to them in said County in the preceding year; and

Whereas, in pursuance of said notice the question of funding the County indebtedness was duly submitted to the vote of the duly qualified electors of said Lake County at the said general election which occurred on Tuesday, November 8, 1881; and

Whereas, the County Treasurer of Lake County made out and caused to be delivered to the Judges of Election in each election precinct in the County, prior to said election, a certified list of the taxpayers in said Lake County, who had paid taxes upon property assessed to them in said County in the preceding year, and no person was allowed to vote upon the question of the funding of the County indebtedness at such election unless his name appeared upon such list, nor unless it was found he had paid all County taxes assessed against him in said County in the preceding year; and

Whereas, all persons voting on the question at such election voted by separate ballot, which was deposited in a box
33 used for that purpose only, and on which ballot was printed the words "For Funding County Debt," or, "Against Funding County Debt;" and

Whereas, each ballot was numbered in the order in which it was received, and the number was duly recorded on the list of voters opposite the name of the voter who presented the ballot; and whereas, the judges of election duly made out and certified to the clerk of the county a separate list of the names of the electors voting upon the question of the funding of the county indebtedness in the order in which the ballot of the elector so voting was received; and whereas, the vote on the question was duly canvassed in the same manner as the vote for county officers, and it appeared from such canvass that a majority of the electors voting upon the question voted in favor of funding the county indebtedness.

Now, therefore, it is hereby certified that the amount of floating indebtedness of the said County of Lake amounted to the sum of five hundred thousand dollars on the date of the first publication of the notice to warrant holders, that is to say, on the sixth day of September, A. D. 1881.

And it is therefore ordered that the Board of County Commissioners issue coupon bonds of Lake County to the amount of five hundred thousand dollars, said bonds to be dated January 2, 1881, to be payable at the pleasure of the county after ten years from the date of issue, and absolutely due and payable twenty years after such date, such bonds to bear interest at the rate of eight per cent. per annum, payable semi-annually, on the first day of January and the first day of July in each year. Such interest and the principal of said bonds, when due, to be payable at the banking house
34 of Jesup, Paton & Co., in the city of New York, or at the office of the County Treasurer of Lake County, in the city of Leadville, at the option of the holder. Such bonds shall be divided into three series, designated "A," "B" and "C," respectively. Series "A" to consist of 450 bonds for the sum of $1,000 each, to be numbered from No. 1 to No. 450, both numbers inclusive. Series "B" to consist of 60 bonds for the sum of $500 each, to be numbered from No. 451 to No. 510, both numbers inclusive; and series "C" to

consist of 200 bonds for the sum of $100 each, to be numbered from No. 511 to No. 710, both numbers inclusive.

The form of such bonds shall be as follows:

No. ——— United States of America, $1,000

County of Lake, State of Colorado,

Funding Bond, Series A.

The County of Lake, in the State of Colorado, acknowledges itself indebted, and promises to pay to ——————— or bearer one thousand dollars, lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of said county, in the city of Leadville, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder, with interest theron at the rate of eight per cent. per annum, payable semi-annually, on the first day of January and the first day of July in each year, at the office of the County Treasurer aforesaid, or at the banking house of Jesup, Paton & Co., in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of 710 funding bonds, each of like date, comprised in three series, designated "A," "B" and "C" respectively. Series "A," consisting of 450 bonds for the sum of one thousand dollars each, numbered from 1 to 450, both numbers inclusive; series "B" consisting of 60 bonds for the sum of five hundred dollars each, numbered from 451 to 510, both numbers inclusive; and series "C" consisting of 200 bonds for the sum of one hundred dollars each, numbered from 511 to 710, both numbers inclusive. The whole amounting to five hundred thousand dollars, which the Board of County Commissioners of said Lake County have issued under and by virtue of, and in full compliance with, an act of the General Assembly of the State of Colorado, entitled "An act to enable the several counties of the state to fund their floating indebtedness," approved February 21, 1881, and it is hereby certified that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond. It is further certified that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said County of Lake, voting on the question at a general election, duly held in said county on the eighth day of November, A. D. 1881. The faith and credit of the County of Lake are hereby pledged for the punctual payment of the principal and interest of this bond. In testimony whereof the Board of County Commissioners of said County of Lake has caused this bond to be signed by its Chairman, countersigned by the County Treasurer, and attested by the County Clerk, under

the seal of the county, this second day of January, A. D.
36 1882.

[COUNTY SEAL.] _____,
Chairman Board County Commissioners.

Countersigned,

_____,
County Treasurer.

Attest: _____,
County Clerk.

Such bonds shall be signed by the Chairman of the Board of County Commissioners, countersigned by the County Treasurer and attested by the Clerk of Lake County, who shall stamp the seal of the county upon each bond. Each bond shall state upon its face to whom it is issued, and shall be registered in a book kept for that purpose by the County Treasurer. On or after the second day of January, A. D. 1882, the County Treasurer shall issue such bonds to any person or corporation presenting any Lake County warrants issued prior to the seventh day of September, 1881, in exchange for such warrants, taking such warrants at their face value, with accrued interest added up to January 1st, 1882, and issuing the bonds in exchange for the same at par.

STATE OF COLORADO, } ss.
County of Lake. }

I, F. M. Reardon, County Clerk and ex-officio Clerk of the Board of County Commissioners in and for the County and State aforesaid, do hereby certify that the annexed and foregoing order is truly copied from the records of the proceedings of the Board of
37 County Commissioners for said Lake County, now in my office.

In witness whereof, I have hereto set my hand and affixed the seal of said county, at Leadville, this 2d day of March, A. D. 1885.

(Signed), F. M. REARDON, *County Clerk.*
[SEAL LAKE COUNTY.] Per H. M. BURREL, *Deputy.*

(Signed), TELLER & ORAHOOD,
ROBT. E. FOOT,
Attorneys for Plaintiff.
DANL. E. PARKS, *County Att'y,*
38 *Attorney for Defendant.*

Whereupon the said counsel for the said Benjamin Graham, plaintiff, did then and there insist before the said Court on behalf of the said Benjamin Graham, plaintiff, that the said several matters so produced and given in evidence on the part of the said Benjamin Graham, plaintiff, as contained in said statement, agreement and

admission of facts were sufficient in law, and ought to be admitted and allowed as decisive evidence, and the law applicable thereto conclusive, to entitle the said Benjamin Graham, plaintiff, to a finding in his favor on said issues by said Court, and a judgment thereon in his favor for the sum of lawful money of the United States claimed to be due in said action, both principal and interest. But to this the counsel of the Board of County Commissioners of the said County of Lake did then and there argue and insist before said Court that the same alleged facts so as aforesaid admitted, applying the law of the land thereto, were not sufficient nor ought to be admitted or allowed to entitle the said Benjamin Graham, plaintiff, to a finding and judgment in his favor so as aforesaid claimed and demanded in this cause; and the said Board of County Commissioners of said county then and there on the trial and argument of said cause by its said attorney and counsel did insist that the cause and causes of action in the said plaintiff's complaint alleged and set forth were wholly, totally, and of right, barred, invalid and of no obligatory force or effect whatever, by, through, under and in consequence of the force and effect of section six of article eleven of the constitution of the State of Colorado in such case made and provided, as alleged and set forth in the said answer of the said Board of County Commissioners of the County of Lake, made and of record in this
39 cause as aforesaid, and that by reason thereof, the said Board of County Commissioners of the County of Lake was entitled upon the facts admitted as aforesaid, by the force and effect of the said constitutional law and the law of the land applicable thereto to a finding and judgment by said Court in its favor and against the said Benjamin Graham, plaintiff, for the costs of this action. But the said counsel, learned in the law, of the said Benjamin Graham, plaintiff, did then and there insist before said Court that the same allegations, arguments and contentions of the said Board of County Commissioners were not sufficient nor ought to be admitted or allowed to entitle the said Board of County Commissioners to a finding and judgment in its favor, or to bar the said plaintiff of his aforesaid action as alleged and set forth in his said complaint herein. Thereupon the said cause and the issues involved therein of law and fact were submitted to said Court before said Judge for adjudication and determination according to law. And the said parties did then and there duly consent and agree by and between themselves and said Court, that said Court in adjudicating and determining the issues of said cause so as aforesaid submitted to said Court, might take the same under consideration and render judgment therein after arriving at such determination, at and during any time thereafter transpiring in the said November term of said Court or in or at the May term of said Court, A. D. 1888, and afterwards, to wit: on the eighth day of May, A. D. 1888, at the said May term of said Court the said Honorable David J. Brewer, said Judge of said Court, did then and there declare and deliver his finding, opinion and judgment of said Court in this the above entitled cause and upon the issues of fact and law therein joined, which opinion, decis-
40 ion and judgment is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Colorado.

FRANK ROLLINS,
v.
THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY. } 2102.

Opinion, Brewer, C. J.

This action is upon county warrants. The circumstances which surround it make it one of peculiar importance. For ten years, and from the admission of the State in 1876, many Counties whose tax levy was insufficient to meet current expenses had been issuing warrants, which had accumulated to, as counsel says, at least $1,000,000. No question seems to have been made during these years as to the validity of such action; but the question being thereafter presented to the Supreme Court of the State, it construed section six of article eleven of the Constitution of the State in such a manner as to invalidate the bulk of these warrants. The plaintiff, being a non-resident, comes into the Federal Court and invokes its judgment as an independent tribunal on the question thus determined by the State Supreme Court.

No more delicate or responsible duty is ever cast upon the Federal Court than when it is asked to determine, not what the State Supreme Court has decided, but whether its decision shall be followed. While the Federal Courts are in a certain sense independent tribunals, yet they sit within the State to construe and enforce its laws. Whenever a construction has been placed upon a State statute or constitution by her Supreme Court, that determines for both State and Federal Courts all questions and rights arising after such construction. But when the rights or claims of rights arose prior to such construction, then the duty rests upon the Federal Courts of independent examination and determination. The rule controlling in such cases is fully and clearly stated in the recent case of Burgess vs. Seligman 107 U. S. 33, as follows:

"Since the ordinary administration of the law is carried on by the State Courts, it necessarilly happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of

the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean toward an agreement of views with the State Courts, if the question seems to them balanced with doubt.

Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State Courts. As, however, the very object of giving to the National Courts jurisdiction to administer the laws of the States, in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

See also, Pana vs. Bowler 107 U. S. 540.
Green County vs. Commissioners 109 U. S. 104.
Carroll County vs. Smith 111 U. S. 556.
Anderson vs. Santa Anna 116 U. S. 362.
Bolles vs. Brimfield 120 U. S. 759.

Accepting that as a rule to control this Court, I pass to a statement and consideration of the immediate question.

The section of the constitution referred to is as follows:

"No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges: and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit: Counties in which the assessed value of the taxable property shall exceed $5,000,000, $1.50 on each $1,000 thereof; counties in which such valuation shall be less than $5,000,000, $3 on each $1.000 thereof. And the aggregate amount of indebtednes of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debts so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided, that this section shall not apply to counties having a valua-
41 tion of less than $1,000,000."

The decisions of the Supreme Court of Colorado referred to are People *ex rel.* Seeley vs. May 9 Col. 80, and 404 and 414.

In the first of these cases the question was whether this section in all its sentences referred exclusively to debts contracted by loan,

and it was held that it did not; that there were two independent declarations in it, and that the third sentence commencing, "And the aggregate amount of indebtedness of any county for all purposes," was not limited to debts by loan, but applied generally to all. In the second case the question was whether the limitation upon county indebtedness, imposed by this section, included debts incurred by operation of law, as well as those arising from express contracts, and it was held that it did.

Returning now to the first question, it was and is earnestly insisted by the learned counsel for plaintiff that the scope and intent of the entire section is indicated by its opening lines, which expressly name debts by loan; that, as a general rule, each separate section is to be construed as carrying one idea through all its sentences, and that, even without special words of reference in the later sentences, they are to be construed as based upon the first idea or controlling fact; that not only is such the ordinary rule of construction, but also to establish a different one for this section would result in glaring absurdities, hindering the administration of county affairs in such a manner and to such an extent as shows that such was not the intent of the framers of the constitution or the people who adopted it.

Again, it is insisted that, although prior to the framing of this constitution seven states had incorporated into their constitutions limitations upon county indebtedness, a comparison of the condition of those states with this, in territory, population and county organization, shows the absurdity of the meager powers given to counties in this state under such a construction of this section.

And again, great reliance is placed upon contemporary construction; inasmuch as for ten years many counties have transacted business and issued warrants as though no such limitation as is now claimed existed; inasmuch as several suits were brought in different Courts, both state and federal, upon county indebtedness, in which the defense of this limitation existed but was not presented; inasmuch, also, as several acts of the Legislature applied to facts as they existed, and, as it must be presumed, were known to exist, conflict with the limitation imposed by this construction.

It will be observed that the language of the third sentence is general. It says: "That the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed," etc.

Now, in order to make it mean what counsel claim it means, the word "such," or some word of similar meaning, must be implied prior to the words "indebtedness" or "purposes," and counsel insist that such word should be implied, and that the meaning is correctly expressed when the language is "the aggregate amount of such indebtedness," or "for all such purposes." That a word may be supplied or implied when necessary to carry out the obvious intent of the sentence is, of course, conceded; but can the intent be presumed to justify the supply of the omission? It is, of course, always a question of construction, and the thought and intent of the framer is the thing to be determined.

I have read the opinion of the Supreme Court on this matter and studied it with care. The solid thread of the argument of the learned judge who wrote that opinion is to mind irresistible. It compels conviction.

Starting with the conceded and elementary proposition that in determining the meaning of any instrument, whether agreement, statute or constitution, we look first to the words used and seek their natural signification in the order of grammatical arrangement in which they are found, he shows that the sentences are separate and complete, the propositions in them independent declarations, and that there is no grammatical necessity of implying or supplying any word to perfect either. Hence, the supplying or implying of a word must find some other reason than the mere gram-
42 matical arrangement for its justification.

Again, he calls attention to what, in my judgment, is most significant: The proceedings of the convention that framed this constitution. If in construing any sentence it becomes a question whether any word should be implied which is not found in order to fully express the true meaning, and we can know that when the sentence was being prepared the question of whether that very word should be inserted was presented, discussed, and it was finally determined to reject it, we should be driven almost irresistibly to the conviction that the meaning which that omitted word would disclose was not the meaning intended by the makers. Now it appears from the debates in the convention that the question of introducing this word "such" into the sentence was presented and discussed; that two or three times it was voted to introduce it and as often voted to strike it out; and that finally it was left out and the proviso at the close of the section added. I do not see how demonstration could be made more perfect as to the intent of the framers of this section. (Cooley on Const. Limitations, 66.) That which was their intent, as shown by the gramatical arrangement of the language and by their discussions, must in a matter of this kind be presumed to have been the intent of the people in adopting this constitution. The learned judge also notices other matters, such as the language of an address prepared by the convention and submitted with the constitution to the people; but I do not care to pursue this matter further or notice the various reasons urged by him in support of the conclusion. It is enough to say that I think his reasoning unanswerable.

I pass now to the second question.

Does the limitation upon county indebtedness imposed by this section include debts incurred by operation of law as well as those arising from express contracts? This question may be really separated into two. First, in determining when the limit is reached, what is to be included, and second, what effect has the limit when reached upon the powers and liabilities of the county.

In regard to the first, it will be noticed that county indebtedness may arise in one of three ways. It may spring from the voluntary contracts of the county authorities. Second, it may be cast upon the county by the action of the legislature in requiring the payment

by it of certain fees and salaries, and in respect to debts of this class the county as such exercises no choice, has no volition. They are compulsory as distinguished from contractual obligations. Further, it may arise from some tortious act of the county authorities. Such a tort creates a liability against the connty, which, ripening into a judgment, becomes a debt.

Now in determining when the limit of county indebtedness has been reached, it is obviously immaterial under said section how any particular portion of the indebtedness arose or whence it sprang. It is enough that it is a debt. The language of the section is "the aggregate amount of the indebtedness of any county for all purposes shall not exceed," etc. Every dollar of the indebtedness might have sprung from tortious acts of county officials which, prosecuted by the injured parties in actions *ex delicto*, have ripened into judgments and thus become debts, and still the limit be reached. Indeed the process of determination is a mere matter of mathematical calculation, the adding up of the valid debts of the county.

Secondly, suppose the limit has been reached. What effect has that on the powers and liabilities of the county? That it puts an end to its contractual powers is clear. So the Supreme Court held. Such was the obvious purpose of the framers of the section. They were familiar with the experiences of other states, the territorial laws in force, and the ordinary ways of county business everywhere. They knew that a large discretion was given to County Commissioners in the matter of creating obligations against the county. They knew that it was usual to give to them power to build and keep in repair county buildings; to lay out, open and improve county roads, build bridges and otherwise subject the county to large expenditures. With this in view, the obvious purpose of the statute was to limit their powers in this direction, and to say that beyond a certain sum no county official should be authorized to contract a debt binding against the county.

On the other hand it is equally clear that this section does not enable a county to defeat its liability for a tort or prevent such liability from being merged into a judgment and thus becoming a debt. It is no defense to an action for a wrong, that if judgment be recovered therefor it will carry the county indebtedness beyond the constitutional limit. This is conceded by the Supreme Court in this opinion. It says: "Involuntary liability arising *ex delicto* is a subject that is not contemplated by the provision." In this the
43 Court only follows prior decisions in other states.

In Bartle vs. The City of Des Moines, 38th Iowa, 414, the same doctrine was affirmed.

So, also, in the case of Bloomington vs. Perdue, 99 Illinois, 329, the Court in that case, in a single sentence, disposing of the question as though a contrary doctrine were too absurd to require discussion.

See, also, Chicago vs. Sexton, 115 Illinois, 230, in which the Court uses this language: "There is nothing new in thus holding a municipality responsible for the want of fidelity of those who act for it. Suits of that kind are of daily occurrence. The liability thus

imposed is not within the constitutional and statutory limitations in regard to the creation of indebtedness." So it has been held in Iowa, that where warrants were issued in excess of the constitutional limit, and judgments rendered thereon, the defense of invalidity not having been pleaded, and that through the fraud of the supervisors of the County, and thereafter bonds issued in payment of such judgments, the bonds were valid in the hands of a *bona fide* holder.

R. R. Co. vs. Osceola Co., 45 Iowa, 168, and 52 Iowa, 26.

The other class of indebtedness springs from neither the voluntary nor the tortious acts of county officials. The County has neither voice nor opportunity in the matter. They are imposed by the legislature, and are generally such as to affect the State at large as well as the County.

It is well here to stop a moment and consider what a County is. In one respect it is an independent corporation, having peculiar private interests and concerns. The management of these interests and concerns is, as a general rule, confided to the county officials, and the debts incurred in the management of those private affairs are created by the voluntary contracts of those officials. In another aspect, the county is but a mere subdivision of the State, and only determines locally the administration of those affairs which affect the people of the State as a whole. Take the administration of justice in the Courts; the matter of elections; the preservation of the public peace, and matters of a kindred nature. They are not the purely private concerns of the county. They affect vitally and largely the interests of the State as a whole. It is common elsewhere, it was and is the case here, that the cost of these public services is cast largely upon the county. Not upon the county as an independent corporation and solely interested in and benefited by such services, but as a portion of the State, and as such portion thus contributing to the general welfare.

In the creation of debts for these services the county is not consulted. It has no voice in saying when they shall be incurred or to what extent. I know the line of demarcation is not preserved with absolute uniformity, but the general character of the difference between contractual and compulsory obligations is as I have stated. This is a matter of common knowledge, and must have been within the contemplation of the framers of the constitution. Was it their intent to relieve the county of liability for these compulsory obligations when in any manner the general limit of indebtedness has been reached? See what that would imply: the possibility that County Commissioners, by extravagance, might largely impair, if not practically defeat, the administration of justice, the preservation of the peace, and even the holding of elections. For public service without expectation of pay is seldom done; or, if done, only poorly. Will a Constable serve process; will a Sheriff at personal risk, preserve the public peace; will a County Attorney prosecute with vigor and interest; will a juror or witness attend, giving up private inter-

ests for public good, with the knowledge that these their services are gratuitous and will receive no compensation?

Will it be said the Legislature can guard against these dangers by an increase of the tax levy? Who shall say how great will be the extravagance of county officials; or even if that could be restricted by law, who can foretell how much of crime will happen during any coming year? I am advised by counsel that the suppression of a single riot in Leadville cost the county more than the entire proceeds of that year's levy. These things cannot be foreseen.

Can it be that the framers of the constitution intended that compensation for such services should depend upon the question whether a limit of county indebtedness had been reached? It must be borne in mind that the amount of such expenditures can never be foreseen. In one year they may aggregate a great amount and in the next be comparatively trifling.

These considerations of a general nature impress me forcibly with the conviction that it was not the intent of the framers of this section to permit a county to escape from liability on account of such compulsory obligations by the fact that its general limit of indebtedness has been reached. This conviction is strengthened by this provision in the section: That the indebtedness "shall not at any time exceed the amount above herein limited unless when in manner provided by law the question of incurring such debt shall, at a general election, be submitted," etc. Now, what a county proposes voluntarily to do, what amount of debt it intends voluntarily to create, may be known and submitted to a vote; but who can foresee what amount of crime may be committed; what criminal cases may have to be prosecuted; what expense must be incurred in such prosecution, or in preserving the public peace not yet ap-
44 parently threatened?

These are matters which, as they cannot be foreseen, cannot well be provided for by submission to popular vote. "Such debt" is the language. Obviously, a debt that is contemplated and not one that may simply be imagined. This question did not arise in this state for the first time. In 1885 the Supreme Court of Missouri considered and decided it. In Book vs. Earle, 87th Missouri, 246, that Court held that a county could not contract a debt for any purpose in excess of its revenue for the current year without the special assent of the voters, and that when it was desired to create a debt in excess of such revenue for the improvement of the court house, the question must first be submitted to the qualified voters. But, at the same term, in Potter vs. Douglas County, same volume, page 239, the same Court held that the constitutional limitation as to indebtedness has no application to a debt incurred by a county for the keeping and transporting of its prisoners by the sheriff or jailor of another county. The judge who wrote the opinion in that case thus states the reasons therefor:

"After carefully considering the subject, I am not of opinion that the constitutional prohibition should be ruled to apply in instances like the present. For this conclusion these are my reasons: I do not regard section twelve, *supra*, as applying here, because the effect

of such construction would be destructive of the peace and good order of every county embraced within the provisions of section 6090 aforesaid, for it would be an impossibility to submit to a vote of the people of the county concerned, the question of an unascertained and unascertainable indebtedness to be incurred in the future as the exigencies of the case might demand. Who could foretell how many criminals would be arrested in the ensuing year? If this could not be done, is it not glaringly obvious that no question as to the amount of the indebtedness could possibly be submitted to the people for the sanction of their suffrages? The maxim, *lex non cogit ad impossibilia*, may appositely be invoked in the present case, a maxim equally invocable whether the law be statutory or organic."

"But another reason occurs why that section cannot apply in the case at bar. The inhibition of the constitution, it will be observed, is leveled against a county becoming indebted, *i. e.*, through the ordinary channel, the action of the County Court, the financial agent of the county. But here the indebtedness was not so incurred. It was created entirely independent of any action of the County Court; created by the sheriff of the county pursuant to the command of section 6090, *supra*. The law itself gave license to the incurring of such a debt; it was incurred by operation of law, and the fact that the county would ultimately have the debt to pay cuts no figure in this discussion."

It is true, by the constitution of Missouri, there is a limit on the amount of taxation, as well as in the matter of indebtedness, but that does not militate against the force of the argument presented by that Court.

My conclusion therefore is, that it is no defense to an action upon county warrants issued in payment of these compulsory obligations that the general limit of county indebtedness has been reached. I believe that it is agreed between counsel that the warrants sued on in this action are of this nature, and the judgment must be entered therefore in favor of the plaintiff.

I regret that in the conclusions that have been reached I am not fully in accord with the Supreme Court of the State. I regret this not alone because I regard it generally the duty of a Federal Court to follow the Supreme Court of the state in its interpretations of the state statutes and constitution, but also because of the high respect I entertain for the individual members of that Court, who honor the office which they occupy, and whose duties they so admirably discharge; but over against that is the strong voice of appeal arising from the equities of these various warrant holders.

This is not the case of a series of bonds issued to a railroad corporation whose existence and work are, notwithstanding it is called a *quasi* public servant, we all know, prompted by personal and selfish interests, but it is the case of warrants issued to many individuals; witnesses, jurors, constables, sheriffs, and the like, called upon by the laws of the state to render some public service in the administration of justice, the punishment of crime, the preservation of the public peace, the conduct of elections, matters in which the

state as a whole is interested, and which conduce to the general welfare, and who have obeyed the mandates of their state in the undoubting faith that the promised compensation for those services would be paid. Honesty, justice, and all the potential obligations of a solemn promise demand that they be paid; and if I have lent a too willing ear to the voice of such appeal, and have permitted such equities to blind my eye to a clear vision of the literal mandate of the constitution, it is consolation to know that the amount in controversy is so great that a review of these proceedings can be had in the Supreme Court of the United States, by which high
45 and ultimate tribunal any errors and mistakes can be corrected.

And afterwards, and on the 8th day of May, A. D. 1888, the said Judge and Court applying the force, effect and law of the said opinion, judgment and decision to the facts and issues involved in this cause did render, to that end, the judgment, decision and opinion in the following words and figures in this cause, to wit:

In the Circuit Court of the United States, May 8th, 1888.

BREWER, J. (Orally.) In 1591, Graham vs. Lake County, I looked over this agreed statement. It may be true that it does not come exactly within the scope of the opinion of yesterday (rendered in suit 2102, Frank W. Rollins vs. Board of County Commissioners of Lake County,) in that the indebtedness is not stated to be all for these compulsory obligations; and yet, it is stated generally that they were for this and county expenses, so that the county might issue a bond to pay those which were liabilities that could be enforced, and the bond on its face not showing one way or the other, whether it was issued for one or the other, the presumption of the law being in favor of the validity of the bond, the same judgment will be entered.

And afterwards, and at, to wit: the time and place aforesaid, in due time, form and manner, the said Board of County Commissioners of the County of Lake, by its said attorney and counsel, Daniel E. Parks, Esq., did then and there except to the said judgment, ruling, and decision and to that part thereof specifically which holds, adjudges and decrees in reference to the *second question*
46 stated therein that the said constitutional provision is not a limitation upon the said Board of County Commissioners of the County of Lake, as to debts or obligations incurred and imposed on the county of Lake and said Board by operation of law, and especially the debts and claims involved in this action, and that it is no defense to this action that the general limit of county indebtedness had been reached when the obligations, to wit: the bonds and coupons attached thereto alleged and set forth in the said plaintiff's complaint herein were contracted, the debt and obligation thereof being, by said Court, presumed to be compulsory through the operation of law on account of the county warrants exchanged for said bonds and coupons, and hence not within the limit of said constitutional provision; and the said Board did also, then and there, duly, and in due time, form and manner, except to that part of judgment and decision of the said Court which is "*in hæc verba*," to

wit: "In 1591 Graham vs. Lake County, I looked over this agreed statement.

"It may be true that it does not come exactly within the scope of the opinion of yesterday (made and rendered in the suit of Frank W. Rollins vs. The Board of County Commissioners of the County of Lake, No. 2102, which opinion is hereinbefore fully set out), in that the indebtedness is not stated to be all for these compulsory obligations, and yet it is stated generally that they were for this and *county expenses*, so that the county might issue a bond to pay those which were liabilities that could be enforced, and the bond on its face not showing one way or the other, whether it was issued for one or the other, the presumption of the law being in favor of the validity of the bond, the same judgment will be entered." And said
47 Board did also then and there in due time, form and manner duly except to that part of said opinion and judgment which holds that judgment in this cause must be entered therefor in favor of the plaintiff according to the demand for judgment of the plaintiff's complaint. And thereupon the said Court did find for the plaintiff, then and there, on the day and year last aforesaid, and assessed his damages at the sum of seven thousand seven hundred and eighty-seven dollars and eighty-five cents ($7,787.85), to which finding the said Board of County Commissioners of the County of Lake, Colorado, did then and there, in due time, form, and manner duly except thereto; and thereafter, on the 8th day of May, A. D. 1888, judgment was rendered by said Court in favor of said Benjamin Graham, plaintiff, and against said Board of County Commissioners of the County of Lake, defendant, for the sum of seven thousand seven hundred and eighty-seven dollars and eighty-five cents, beside the cost of this action. To which judgment the said defendant then and there, in due time, form and manner duly excepted.

And thereafter, and on, to wit: the 9th day of May, A. D. 1888, the said defendant, the Board of County Commissioners of the County of Lake, by its said attorney and counsel, did make and file in said cause and Court a motion to set aside the said finding and judgment and grant a new trial on the merits of said cause, which
48 motion is *in hæc verba*, to wit:

UNITED STATES OF AMERICA, *District of Colorado*, } ss.

In the Circuit Court of the United States of the Eighth Judicial Circuit of said United States, held within and for said District.

BENJAMIN GRAHAM, *Plaintiff*, *v.* THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *Defendant*, } No. 1591. *Motion to Vacate Judgment, etc.*

And now comes the defendant above named, by Daniel E. Parks and H. B. Johnson, its attorneys, and moves the Court to set aside and vacate the finding and judgment of the Court herein dated May 8th, A. D. 1888, for $7,787.85 and costs, heretofore entered in this

cause, and grant a new trial on the merits, and a rehearing of the issues of law and fact involved in this action, upon the following grounds and for the following reasons, viz:

First—The judgment and finding are against the law of the land.

Second—The judgment and finding are in favor of the plaintiff when they should have been in favor of the defendant for costs of suit.

Third—The Court erred in holding and adjudging that the indebtedness claimed and sued upon in this action was lawful and valid as against the defendant, and that the same was not within the limitations prescribed by section six (6) of article eleven (XI) of the constitution of the State of Colorado in such case made
49 and provided.

Fourth—The Court erred in holding and adjudging that under the pleadings and facts agreed upon, it appeared, or was presumed by law, upon the trial of this cause, that the indebtedness alleged and sued upon in this action was incurred in lieu of county warrants of defendant, made and issued by operation of law and not incurred by voluntary contract.

Fifth—The Court erred in construing the stipulations of the agreed statement of facts in this cause against their manifest purpose and intention, and in holding that under the pleadings and statement of facts in this cause the plaintiff was entitled to judgment in accordance with the opinion of the Court expressed in the case of Rollins vs. Lake County, No. 2102, the facts and circumstances of this case being wholly different from the said cause of Rollins vs. Lake County.

(Signed), DAN'L E. PARKS,
H. B. JOHNSON,
Deft's Attys.

And on, to wit, the 30th day of June, A. D. 1888, at said term of said Court, the said motion coming on to be heard by and before said Court, and being submitted to said Court for its judgment and decision, was overruled by said Court, to which ruling and decision upon said motion by the said Court the said Board of County Commissioner of the County of Lake, defendant, did then and there, in due time, form and manner, duly except.

And inasmuch as the said several matters so produced, given in evidence, had and done in said cause aforesaid, objected and
50 insisted upon as aforesaid, had and done as aforesaid, do not appear by the record of the finding and judgment of said Court aforesaid, the said attorney and counsel for the Board of County Commissioners of the County of Lake, did then and there propose his aforesaid exceptions to the opinion, finding and judgment of the said Court, and the Judge thereof, and requested him to put his seal and signature to this bill of exceptions, containing the said several matters so produced, given in evidence and had as aforesaid in this cause, according to the form of the statute in such

case made and provided; and thereupon the said Judge, at the request of the said counsel for the said Board of County Commissioners of the County of Lake, did put his seal to this bill of exceptions and sign the same, pursuant to the aforesaid statute in such case made and provided, and on, to wit, the 30th day of June, A. D. 1888.

(Signed), DAVID J. BREWER, [SEAL.]
Circuit Judge.

Endorsed:

No. 1591. In the U. S. Circuit Court, District of Colorado. Benj. Graham, plff., vs. The Board of County Commissioners of the County of Lake, deft. Bill of Exceptions. Filed, Jul. 5, 1888. William A. Willard, Clerk. D. E. Parks & H. B. Johnson,
51 Atty's for Def't.

And afterwards, and on, to wit, the 6th day of July, A. D. 1888, came again the said defendant, by its attorney aforesaid, and filed in said Court and in said cause his *præcipe* for a transcript of the record on writ of error to the Supreme Court of the United States. And the said *præcipe* is in words and figures as follows, to wit:

Præcipe for Transcript.

UNITED STATES OF AMERICA, *District of Colorado,* } ss.

In the Circuit Court of the United States for the District of Colorado.

BENJAMIN GRAHAM, *Plaintiff,*
v.
THE BOARD OE COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLO., *Defendant.* } No. 1591.

The Clerk will make a transcript in error in the above entitled cause, containing the following proceedings therein: Summons, complaint, amended answer, replication, judgment and finding of Court and bill of exceptions. In making copy of complaint, let transcript show first page of same and one count as a sample of all others, giving numbers only as duplicates and then add last page, also add amendment to complaint, also add record entries as to trial.

(Signed), D. E. PARKS,
Attorney for Deft.

To WILLIAM A. WILLARD, Clerk.
52 Denver, Colorado, July 5, 1888.

Endorsed:

Gen. No. 1591. Circuit Court of the United States, for the District of Colorado. Benj. Graham, vs. The Board of County Commissioners of the County of Lake, deft. *Præcipe* for Record. Filed this 6th day of July, A. D. 1888. William A. Willard, Clerk, by
53 F. W. Tupper, Deputy Clerk. D. E. Parks, Attorney for Deft.

And afterwards and on, to wit, the 29th day of September, A. D. 1888, came again the said defendant, by its attorney aforesaid,

and filed in said Court and in said cause its *præcipe* for, and sued out of and under the seal of said Court a writ of error to the Supreme Court of the United States, and the said *præcipe* is in words and figures as follows, to wit:

Præcipe for Writ of Error.

UNITED STATES OF AMERICA, } ss.
District of Colorado, }

In the Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *Plaintiff in Error,* v. BENJAMIN GRAHAM, *Defendant in Error.* } *Error to the Circuit Court of the United States for the District of Colorado.*

The clerk will issue a writ of error in the above entitled cause, directed to the Circuit Court of the United States, of the Eighth Judicial Circuit, held within and for the District of Colorado, at Denver, to review the record proceedings and judgment of
54 said Circuit Court in the cause of Benjamin Graham, plaintiff, vs. The Board of County Commissioners of the County of Lake, defendant, wherein judgment was rendered against said board, defendant, May 8, A. D. 1888, for $7,787.85 and costs, and returnable at the October term, A. D. 1888, of said Supreme Court.

(Signed) D. E. PARKS.
Attorney for plaintiff in error.

To William A. Willard, clerk of the U. S. Circuit Court for the District of Colorado, September, 1888.

Endorsed: Gen. No. 1591. Circuit Court of the United States. The Board of County Commissioners of the County of Lake, Colorado, plaintiff in error, vs. Benjamin Graham, defendant in error. *Præcipe* for writ of error. Filed this 29th day of September, A. D. 1888. Signed, William A. Willard, clerk, by F. W. Tupper, deputy clerk. D. E. Parks, attorney for plaintiff in error.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

55 *Writ of Error and Return.*

Writ of error to Circuit Court, U. S., District of Colorado.

UNITED STATES OF AMERICA, } ss.
District of Colorado. }

The President of the United States, to the Judges of the Circuit Court of the United States, for the District of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, between Benjamin Graham and The Board of County Commissioners of the County of Lake, a manifest error hath happened, to the great dam-

age of the said The Board of County Commissioners of the County of Lake, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, this second day of October in the year of our Lord, one thousand eight hundred and eighty-eight, and of the independence of the United States the one hundred and thirteenth year.

(Signed), WILLIAM A. WILLARD,
[SEAL CIRCT. CT. U. S. COLO.] *Clerk.*
Allowed by
56 MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado. } ss.

In obedience to the command of the within writ I herewith transmit to the Honorable Supreme Court of the United States a duly certified transcript of a portion of the record and proceedings in the within entitled case, as specified in the *præcipe* therefor filed herein, together with all things concerning the same.

Witness my hand and seal of said Circuit Court, at Denver, in said district, this fifth day of October, A. D. 1888.

(Signed), WILLIAM A. WILLARD,
[SEAL CIRCT. CT. U. S., COLO.] *Clerk.*

Endorsed: Writ of error to Circuit Court, U. S. District of Colorado. Filed in Circuit Court of the U. S. this fifth day of
57 October, A. D. 1888. Signed, William A. Willard, clerk.

And afterwards, and on, to wit, the second day of October, A. D. 1888, came again the said defendant, by the attorney aforesaid, and filed in said court, and in said cause, its bond on writ of error, and sued out of said Court a citation to the Supreme Court of the United States. And the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

In the Supreme Court of the United States of America.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *Plaintiff in Error,*
vs.
BENJAMIN GRAHAM, *Defendant in Error.*

Security on Error to the Circuit Court of the United States, District of Colorado.

Know all men by these presents, that we, the Board of County Commissioners of the County of Lake, Colorado, the County of Lake, Colorado, and Perley Dodge, William L. Otterbach, Jeremiah Irwin, Frank DeMainville and Daniel E. Parks, of the said county of Lake, are held and firmly bound unto Benjamin Graham, of the state of New York, in the sum of five hundred (500) dollars, to be paid to said Benjamin Graham, his executors or administrators.

To which payment, well and truly to be made, we bind our-
58 selves, and each of us, jointly and severally, our and each of our heirs, executors and administrators, firmly by these presents.

Seals with our seals. Dated this first day of October, A. D. 1888.

Whereas, the above named, The Board of County Commissioners of the County of Lake, Colorado, The County of Lake, Colorado, hath prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above entitled action by the Circuit Court of the United States of the Eighth Judicial Circuit, held within and for the District of Colorado, at Denver in said district, said judgment being against said plaintiff in error and in favor of said defendant in error, for the sum of seven thousand seven hundred eighty-seven 85-100 dollars, and cos's of suit, ($7,787.85), and dated the eighth day of May, A. D. 1888.

Now, therefore, the condition of this obligation is such that if the above named, The Board of County Commissioners of the County of Lake, Colorado, plaintiff in error, shall prosecute its said writ of error to and with effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO,
59 THE COUNTY OF LAKE, COLORADO, [SEAL.]
By PERLEY DODGE,
Chairman and Atty. in fact.
PERLEY DODGE, [SEAL.]
WM. L. OTTERBACH, [SEAL.]
JEREMIAH IRWIN, [SEAL.]
F. DEMAINEVILLE, [SEAL.]
DAN'L E. PARKS, [SEAL.]

Sealed and delivered in presence of
(Signed), C. C. KELOGG.
D. E. PARKS.

Allowed and approved Oct'r. 2, 1888.
(Signed), MOSES HALLETT,
District Judge.

Endorsed. No. 1591. Supreme Court of U. S. A. The Board of County Comm'rs of Co. of Lake, Colo., Plff. in Error, vs. Benjamin Graham, Deft. in Error. Bond for costs on error. Filed Oct. 2, 1888. William A. Willard, clerk. Dan'l E. Parks, attorney for plff. in error.

And the said citation is next hereto attached, to wit:

60 *Citation.*

Citation, U. S. Circuit Court.

UNITED STATES OF AMERICA, }
District of Colorado, }

The United States of America: To Benjamin Graham, defendant in error, *Greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the eighth day of October next, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein the Board of County Commissioners of the County of Lake is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Moses Hallett, judge of the Circuit Court of the United States for the District of Colorado, this second day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

(Signed), MOSES HALLETT,
61 *Judge.*

Endorsed. Gen. No. 1591. Circuit Court of the United States, District of Colorado. The Board, etc., Lake County, plaintiff in error, vs. Benjamin Graham, defendant in error. Citation. Filed in Circuit Court of the U. S. this 2d day of October, A. D. 1888. (Signed), William A. Willard, clerk. D. E. Parks, attorney for plaintiff in error.

Received a copy of the within citation this 2d day of October, 1888. (Signed), ROBERT E. FOOT,
62 *Atty. for defendant in error.*

UNITED STATES OF AMERICA, }
District of Colorado, } ss.

I, William A. Willard, clerk of the Circuit Court of the United States for the District of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect and complete tran-

script and copy of a portion of the record and proceedings as specified in the *præcipe* therefor filed herein, heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein Benjamin Graham was plaintiff and the Board of County Commissioners of the County of Lake was defendant, as fully and completely as the same still remaim on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fifth day of October, A. D. 1888.

(Signed), WILLIAM A. WILLARD,

63 [SEAL BIRCUIT COURT.] *Clerk.*

IN THE SUPREME COURT OF THE UNITED STATES.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO,
Plaintiff in Error,
vs.
BENJAMIN GRAHAM,
Defendant in Error.

Assignment of Errors.

OF THE OCTOBER TERM A. D. 1888.

Afterwards, to wit: on the second Monday of December, in this same term before the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, comes the said The Board of County Commissioners of the County of Lake Colorado, plaintiff in error by its attorney Daniel E. Parks, and says that in the record and proceedings aforesaid there is manifest error in this, to wit·

First—The Circuit Court of the United States for the District of Colorado and the Judge of said Court, Hon. David J. Brewer erred in applying the force, effect and law of the opinion, judgment and decision of said Court and Judge given in the said cause of
64 Frank W. Rollins vs. The said Board of County Commissioners, No. 2102, to the facts and issues involved and contained in the aforesaid cause of Benjamin Graham, plaintiff vs. The Board of County Commissioners of the County of Lake.

Second—The said Court and Judge erred, applying the force effect and law of such opinion, judgment and decision of said cause of Rollins vs. The Board etc., in deciding and adjudging in the said cause of Benjamin Graham vs. The Board of County Commissioners of the County of Lake as follows, to wit:

"In 1591 Graham vs. Lake County I looked over the agreed statement. It may be true that it does not come exactly within the scope of the opinion of yesterday (rendered in suit 2102, Frank W. Rollins vs. Board of County Commissioners of Lake Co.) in that the indebtedness is not stated to be all for these compulsory obligations, *and yet it is stated generally that they were for this and county expenses,* so that the county might issue a bond to pay those which were liabilities that could be enforced, and the bond on *its face not showing one way or the other* whether it was issued for *one* or the *other* the *presumption of the law* being in favor of the validity of the bond, the same judgment will be entered." And in this to wit: 1st. The finding that it was stated generally in the agreed statement of fact that the indebtedness sued on was for compulsory obligations and county expenses, was gross error; 2d. The finding that the bond

on its face not showing one way or the other whether it was issued for one or the other (compulsory or voluntary) the presumption of law was in favor of the validity of the bond, was also gross error.

Third—The said Court and Judge erred in deciding, ruling and adjudging in and on the trial of the aforesaid cause that sec-
65 tion six (6) of article eleven (XI) of the constitution of the State of Colorado alleged and set forth in the aforesaid record of said cause, was and is not a limitation upon the power of the said plaintiff in error as to debts and obligations incurred and imposed by compulsory operation of law, and especially as to those claims and debts involved in this, the aforesaid action.

Fourth—The said Court and Judge erred in ruling and deciding in and on the trial of the aforesaid action that it was and is no defense to the aforesaid action that the general limit of county indebtedness had been reached when the obligations, to wit: the bonds and coupons attached thereto alleged and set forth in the plaintiff's complaint in said action were contracted, the debt and obligation thereof being by said Court and Judge *presumed*, as a presumptive conclusion of law, to be compulsory through the operation of law on account of the county warrants exchanged for said bonds and coupons, said Court and Judge also ruling and deciding that by consequence thereof the same were not within the limit of said section six (6) of article eleven (XI) of the said constitution of the State of Colorado in such case made and provided, all of which said rulings, decisions and presumptions were and are signal errors, and each of them is erroneous.

Fifth—The said Court and Judge erred in finding the issues of the aforesaid cause in favor of the plaintiff below and against the defendant below and in assessing the said plaintiff's damages at the sum of seven thousand seven hundred and eighty-seven dollars and eighty-five cents ($7,787.85) the said plaintiff being entitled to no recovery at all.

Sixth—The Court and Judge erred in giving and entering judgment in the aforesaid cause in favor of the said plaintiff below and against the said defendant below for the sum of seven thousand seven hundred and eighty-seven dollars and eighty-five cents
($7,787.85) and costs, the said plaintiff being entitled to no
66 judgment at all.

Seventh—The said court and judge erred in finding in and upon the trial of the aforesaid cause the issues thereof in favor of the plaintiff below and against the defendant below.

Eighth—The said Court and Judge erred in not giving and entering judgment in the aforesaid cause in favor of the defendant below and against the plaintiff below for costs.

Ninth—The said Court and Judge erred in overruling the motion made by the defendant below, in the aforesaid cause, to vacate and set aside the finding and judgment of said Court in said cause and grant a new trial on the merits and a rehearing of the issues of law and fact involved therein; and in this, to wit:

1st. The judgment and finding are against the law of the land.

2d. The judgment and finding are in favor of the plaintiff when

they should have been in favor of the said defendant for costs of suit.

3d. The Court erred in holding and adjudging that the indebtedness claimed and sued upon in said action was lawful and valid as against the said defendant below and that the same was not within the limitations prescribed by section six (6) of article eleven (XI) of the constitution of the State of Colorado in such case made and provided.

4th. The Court erred in holding and adjudging that under the pleadings and the facts agreed upon it appeared or was presumed by law, upon the trial of this cause, that the indebtedness alleged and sued upon in this action was incurred in lieu of county warrants of defendant made and issued by operation of law and not incurred by voluntary contract.

5th. The Court erred in construing the stipulations of the
67 agreed statement of facts in this cause against their manifest purpose and intention and in holding that under the pleadings and statements of facts in this cause the plaintiff was entitled to judgment in accordance with the opinion of the said Court and Judge expressed in the cause of Rollins vs. Lake County, No. 2102, the facts and circumstances of the aforesaid cause being wholly different from the said cause of Rollins vs. Lake County.

Tenth—The finding and judgment of said Court and Judge in the aforesaid cause is contrary to the evidence adduced in said cause on the trial thereof and the law of the land applicable thereto, and such finding and judgment is by reason thereof signally erroneous.

And the said The Board of County Commissioners of the County of Lake Colorado, plaintiff in error, prays that the judgment aforesaid may be reversed and annulled and altogether for naught held and that the said plaintiff in error may be restored to all things which it has lost by occasion of the said judgment.

DAN'L E. PARKS,
68 *Attorney for Plaintiff in Error.*

Endorsed on Wrapper.

Supreme Court of the United States No. [illegible]. The Board of County Commissioners of the County of Lake Colorado plaintiff in error vs. Benjamin Graham defendant in error. In error to the Circuit Court of the United States District of Colorado sitting at Denver.

69 Filed October 10. 1888.

In the Supreme Court

Of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, Plaintiff in Error, vs. BENJAMIN GRAHAM, Defendant in Error.	No. 1265.

STATEMENT OF THE CASE

This is an action upon coupons. The complaint alleges the issuance of certain bonds, on January 2, 1882, which bore interest according to divers coupons thereto attached; that the coupons in suit, before they became due and payable, became the property of plaintiff, and that they were duly presented for payment and payment refused. By an amendment to the complaint it is alleged that the bonds to which the coupons in suit were attached were duly issued under and by virtue of an act of the general assembly of the state of Colorado entitled: "An act to enable the several counties of the state to found their floating indebtedness," approved February, 21 1881.

In the fourth separate defense contained in the answer it was averred that the bonds and coupons in question were issued and the debt and obligation thereof contracted in direct violation of section six, of article eleven, of the constitution of the state of Colorado, and at a time when the limitation of the aggregate amount of indebtedness which could be contracted or incurred for all purposes, as prescribed by said constitutional provision, had been reached and exceeded by defendant, by reason of which said bonds and coupons are absolutely void. Issue was taken upon this fourth defense by a replication. (Record p. 9, 10).

The cause was submitted to the court, without a jury, upon an agreed statement of facts. This agreed statement contains an exact copy of the form of these bonds, showing that each bond belonged to an issue amounting to five hundred thousand dollars. The bonds also contained recitals that they were issued under the funding act referred to in the complaint; that the issue had been authorized by a vote of the people, and that the provisions and requirements of said act had been complied with. (Record p. 14).

The ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth clauses of said agreed statement are as follows:

9th—That in the year 1879, the said county of Lake was indebted to sundry persons for fees of county officers, support of the poor, arrest and prosecution of criminals, feeding and confining prisoners, for juries and witnesses' fees, and *other county expenses*, in the sum of about *one hundred thousand dollars* evidenced by county warrants, and that the assessed valuation of said county for said year was $3,672,703.

10th—That in the year 1880, said county was indebted for similar purposes in the sum of about three hundred

thousand dollars, evidenced by county warrants, and that the assessed valuation of said county for said year was $11,025,793.

11th—That in the year 1881, said county's indebtedness for similar purposes had reached and was the sum of five hundred thousand dollars, evidenced by county warrants, and that the assessed valuation of said county for said year was $16,423,403. Afterwards, in 1882, rebated by defendant in accordance with the decision of the supreme court of this state to about $5,017,000.

12th —That said indebtedness of $500,000, so evidenced by county warrants, and for which said bonds were exchanged, was a part of the floating indebtedness of said county, existing and outstanding in the year 1881, and at the time said county gave notice and proceeded to vote under said act, to exchange said warrants for said bonds, as in said bonds recited.

13th—That the indebtedness of said county on the 6th day of September, A. D. 1881, the day the first notice was published under said act, as evidenced by county warrants, was $500,000, and the assessed valuation of the property of said county on said day for all purposes was $16,423,-403; afterwards, in 1882, rebated to $5,017,000, as aforesaid, and said indebtedness and valuation was the same on the day the bonds and coupons attached were issued.

14th—That in addition to said warrant indebtedness of $500,000, said defendant was indebted on bonds for court house, roads and bridges in the sum of $55,000.

15th—That the statement and review of the proceedings of the constitutional convention of Colorado and the address of the convention to the people of the state as set forth by the supreme court of Colorado in the case of Seeley vs. May (9 Colo. 80) is correct. It is further stipulated and agreed that if section 6 of article eleven (11), of the constitution of the state of Colorado, be construed to

be a limitation upon the power of the defendant county to contract any and all indebtedness, including all such as that sued upon in this action, then it is admitted that the claimed indebtedness sued on herein was incurred after the limitation prescribed by said constitution had been reached and exceeded by the said defendant, the county of Lake, and in the event of such a construction, by this court, or the supreme court of the United States, then and in that case, and for the purposes of this action, it is hereby also admitted that the defendant is entitled to judgment thereon unless the defendant is estopped from making such defense by the recitals contained on the face of such bonds and coupons sued on in this action. (Record p. 16, 17).

The court, applying the decision in Rollins vs. Board of County Commissioners of Lake County (which is now pending in this court as Board of County Commissioners of Lake County, Plaintiff in Error, vs. Rollins, Defendant in Error, No. 1347), rendered judgment for the plaintiff. (Record pp. 31–32.).

A motion was made to vacate this judgment and grant a new trial, which motion was as follows:

And now comes the defendant above named, by Daniel E. Parks and H. B. Johnson, its attorneys, and moves the court to set aside and vacate the finding and judgment of the court herein dated May 8th, A. D. 1888, for $7,787.85 and costs, heretofore entered in this cause, and grant a new trial on the merits, and a rehearing of the issues of law and fact involved in this action, upon the following grounds and for the following reasons, viz.:

First—The judgment and finding are against the law of the land.

Second—The judgment and finding are in favor of the plaintiff, when they should have been in favor of the defendant for costs of suit.

Third—The court erred in holding and adjudging that the indebtedness claimed and sued upon in this action was lawful and valid as against the defendant, and that the same was not within the limitations prescribed by section six (6) of article eleven (11) of the constitution of the state of Colorado, in such case made and provided.

Fourth—The court erred in holding and adjudging that under the pleadings and facts agreed upon, it appeared, or was presumed by law, upon the trial of this cause, that the indebtedness alleged and sued upon in this action was incurred in lieu of county warrants of defendant, made and issued by operation of law, and not incurred by voluntary contract.

Fifth—The court erred in construing the stipulations of the agreed statement of facts in this cause against their manifest purpose and intention, and in holding that, under the pleadings and statement of facts in this cause, the plaintiff was entitled to judgment in accordance with the opinion of the court expressed in the case of Rollins vs. Lake County, No. 2102, the facts and circumstances of this case being wholly different from the said cause of Rollins vs. Lake County. (Record pp. 32–33.)

This motion being overruled, and appropriate exceptions to said several rulings having been saved, a bill of exceptions was tendered and allowed. (Record p. 34.) The cause was then brought to this court by writ of error upon error duly assigned. (Record pp. 40–42.)

A stipulation has been filed by which this cause is to be argued and submitted, under rule 20, in connection with the case of The Board of County Commissioners of Lake County, Plaintiff in Error, vs. Rollins, Defendant in Error, No. 1347.

BRIEF OF PLAINTIFF IN ERROR.

As this cause is submitted with the case of The Board, etc., v. Rollins (No. 1347) the important questions therein

raised and discussed, viz: (1) As to whether the limitation prescribed by the constitution (art. 11, sec. 6) is confined to indebtedness *by loan*, and (2) As to whether, if this is not the case, indebtedness incurred by operation of law is to be excepted from the effect of such constitutional provision, will not be re-argued, but submitted upon the arguments and briefs made and filed in the other cause, upon which we stand in this cause. We shall, therefore, present such additional considerations as we maintain require the reversal of the judgment in this cause, independent of the questions involved in the other cause, and attempt to answer such arguments as will be urged by counsel on the other side in favor of the affirmance of the judgment in *this* cause, whether the judgment in the other cause be reversed or affirmed upon the questions above noted.

I.

The record contains nothing, either by way of allegation or proof, that tends to show what part or proportion of the bonds in question, amounting to five hundred thousand dollars, were issued to fund warrants which had been executed upon what the court has called compulsory obligations. The agreed statement of facts shows that in 1881 the county had outstanding county warrants to the amount of five hundred thousand dollars, which said warrants had been issued to sundry persons for fees of county officers, support of the poor, arrest and prosecution of criminals, feeding and confining prisoners, for juries and witnesses' fees, for *other county expenses* and for *similar purposes;* and that these warrants constituted a part of the floating indebtedness of said county, and were the warrants for which said bonds were exchanged. It is self-evident that all that is recited in this agreed statement was merely by way of *inducement*, and was had for the purpose of arriving at the relation that existed between

the indebtedness, and the assessed valuation of the taxable property, of the county. No attempt was made to arrive at the character of these warrants with reference to any *fantastic distinction* respecting so-called *contractual* and *compulsory* obligations. If this had been the intention it would have been an easy matter to have scheduled the warrants which went into the entire issue of funding bonds and shown precisely for what purposes they were originally issued. No one anticipated that if the constitutional limitation should not be construed as confined to indebtedness contracted *by loan*, that any court could except, from the plain language of the constitution, a large mass of indebtedness, amounting to the sum of five hundred thousand dollars that went into these bonds, and include, within such exception, other indebtedness, as shown by the cause with which this is submitted, upon any such *fanciful theory* as has been done; and hence no evidence was presented to meet any such unexpected contingency. But we will proceed to notice the *purposes* for which these warrants were issued as shown by this agreed statement.

The first purpose mentioned is for *fees of county officers.* Will any sane man pretend to claim that *all* fees of *all* county officers are compulsory obligations? We do not understand that the court below, in its wildest flight, has imagined that the mere fact that fees of county officers are regulated by the legislature makes such fees compulsory obligations, wholly irrespective of the nature of the service or whether the same is rendered to the county or to the state. The court below attempted to prescribe a rule upon this subject, and said: "It is well here to stop a moment and consider what a county is. In one respect, it is an independent corporation, having peculiar private interests and concerns. The management of those interests and concerns is, as a general rule, confided to the

county officials; and the debts incurred in the management of those private affairs are created by the voluntary contracts of those officials. In another respect, the county is but a mere subdivision of the state, and only determines locally the administration of those affairs which affect the people of the state as a whole." By way of illustration and definition as to what belongs to the first and voluntary class of matters about which indebtedness could be incurred (and these being the matters of supposed private concern) the court said: "They knew that a large discretion was given to county commissioners in the matter of creating obligations against the county. They knew that it was usual to give them power to build and keep in repair county buildings, to lay out, open, and improve county roads, build bridges, and otherwise subject the county to large expenditures. With this in view, the obvious purpose of the statute was to limit their powers in this direction, and to say that beyond a certain sum no county official should be authorized to contract a debt binding against the county." As to matters supposed to belong to the latter class the court says: "Take the administration of justice in the courts, the matter of elections, the preservation of the public peace, and matters of a kindred nature. They are not the purely private concerns of the county. They affect vitally and largely the interests of the state as a whole. It is common elsewhere, it was and is the case here, that the cost of these public services is cast largely upon the county. Not upon the county as an independent corporation, and solely interested in and benefited by such services, but as a portion of the state, and as such portion thus contributing to the general welfare. In the creation of debt for these services the county is not consulted. It has no voice in saying when they shall be incurred, or to what extent. I know the line of demarkation is not preserved with absolute uni-

formity, but the general character of the difference between contractual and compulsory obligations is as I have stated." We will not stop here to inquire why the building of court houses for the state to hold its courts in, and jails for the state courts to send their prisoners to, are not, in a general sense, just as much matters in which the state is interested, as it is in any other matters pertaining to the administration of the affairs of the state through the agency of counties, about which expense can be incurred, as we are now engaged with the consideration of the question as to whether, in any view of the case, it can be claimed that the fees of all county officers belong to the latter class, as defined by the court. Among county officers are clerks of courts, sheriffs, county treasurers, county clerks, county judges, county commissioners, coroners, justices of the peace, constables, county assessors, county superintendents of public schools, county attorneys, etc. The fees of these officers are largely prescribed by statute, but their services are rendered in the administration of the affairs of the counties in both of the capacities defined by the court below. Such fees constitute an important item in the *ordinary and current expenses of all counties.*

The purpose that is next mentioned in the agreed statement, for which the warrants in question were issued, is *support of the poor.* We have set forth the legislation of this state upon this subject in our brief in The Board, etc., vs. Rollins. (Brief p. 90, 91.) The establishment and maintenance of a poor-house is purely a matter of discretion. (Genl. Stat. Sec. 2538.) Another provision of the chapter relating to paupers (Genl. Stat. Sec. 2532) is as follows: "When any non-resident, or any other person, not coming within the definition of a pauper, shall fall sick in any county of this state, not having money or property to pay his or her board, nursing and medical attendance, it shall

be the duty of the county commissioners, upon complaint made to them, or either of them, to give an order to be given such assistance to such poor person, as they may deem just and necessary, and if said sick person shall die, then said county commissioners, or commissioner, shall give an order to be given to such person a decent burial, and the county commissioners may make such allowance for board, nursing and medical aid or burial expenses, to the person or persons entitled thereto, as *they shall deem just and equitable*, and order the same to be paid out of the county treasury." The agreed statement does not show whether these warrants for the support of the poor were issued in and about the establishment and maintenance of a poor-house, or under and by authority of the last mentioned provision of the statute; but in either event the indebtedness was discretionary, and resulted from contractual dealings with the board of county commissioners.

The purpose next mentioned, for which these warrants were issued, was the *arrest and prosecution of criminals.* The fees of district attorneys, deputy district attorneys, justices of the peace, sheriffs, constables, etc., for the arrest and prosecution of criminals, are generally prescribed by statute, but the question as to whether such prosecutions shall be instituted, and how much expense shall be incurred in the conducting thereof, are necessarily left to the discretionary action of the officers of the counties. It is not only notorious, but perfectly obvious that this is a matter about which *improvidence and extravagance may run riot.* We showed in our brief in the other cause that the entire matter of establishing, changing and abolishing justice precincts and justice of the peace courts, is committed to the discretion of the board of county commissioners. A justice's court must have a constable, and offenses against the law must be found sufficient to main-

tain these establishments. Every one knows that these courts may be extravagant or economical, as they may deem proper, or as they may be constrained by law. It was the intention of the convention that framed the constitution to "prevent extravagance" with reference to all such matters. To accomplish this purpose, the indebtedness that could exist against a county was limited, and it was required that, if these officers of counties would be extravagant, provision must be made, by immediate taxation, to meet indebtedness beyond this limit that might be contracted by all such officers. The court below, in order to reach the conclusion that it did reach, was compelled to indulge in all sorts of presumptions that county officials would be extravagant, and thus incapacitate the counties for administering public affairs; but the more reasonable presumption would be that a provision of the constitution, designed to prevent this very exravagance, would have the effect intended. It will have this effect if it is enforced, and the fact that it has been disregarded and violated by officers of counties, furnishes no reason or excuse for repealing it by construction.

The next purpose for which such warrants were issued was for *feeding and confining prisoners.* We have, also, in our brief in the other cause, called attention to the legislation in this state upon the subject of the establishment and management of jails and the restraint and care of prisoners. The entire subject is committed to the discretion of the board of county commissioners. It may be said that the law makes it the duty of such board to act with reference to these matters, but neither the measure of this duty nor the amount or rate of expense that may be incurred in the performance thereof, is anywhere prescribed. Here is another field in which it is most obvious that either extravagance or economy may be the rule. Which shall it be? The constitution has declared that,

with certain exceptions, the counties shall administer all of these matters, and perform the duties devolved upon them by law, *within their income*, but the court below has held that no matter how profligate the officers of the counties may be; no matter how little taxation is resorted to to meet these *current expenses*, and no matter how much indebtedness results from this profligacy, the validity of their action is not affected by the constitution.

The next purpose mentioned in the agreed statement is for *juries and witnesses' fees*. Here is another field in which vast discretion can be exercised by county officers in contracting and incurring indebtedness. Trifling causes may be multiplied and large numbers of witnesses may be summoned, a large proportion of which can be, and, in the interest of economy, should be, dispensed with; and, in many cases, the purposes of justice would be best subserved by doing so. The law prescribes what the fee of a witness and juror shall be, but it does not call the jury or summon the witness. This is left to the *discretion of officers*. If it be said that this discretion is controlled by the *exigencies of the occasion*, we answer that the requirements of the law can be fulfilled with due reference to *economy*, or the wildest extravagance can be indulged in. Officers must subserve certain ultimate purposes, but there are two ways to do everything. It is the duty of every man to live while he can, but he should, and generally must, live according to his *income and ability*. The constitution merely applies this principle to counties. It does not limit their income. If an emergency arises it may be met by the levy of a special tax, and special warrants, even in advance of its collection, may be drawn thereon to meet such emergency. It is not necessary that authority to incur indebtedness should be considered or treated as a panacea for every ill to which the body politic may be exposed. On the contrary, public indebtedness

itself, is regarded by the constitution, as an evil that must be restrained.

There are two other classes of purposes mentioned in this agreed statement, (1) *other county expenses*, and, (2) *similar purposes*. The agreed statement shows that the great bulk of the outstanding warrant indebtedness of the county (amounting to five hundred thousand dollars) went into these funding bonds. It can be easily seen, from this fact, that these warrants represented an indebtedness incurred for all the varied purposes, and with reference to the various subject matters, about which a county can incur indebtedness. The terms "other county expenses" clearly include all the other purposes for and about which there is a *current expense*. The terms "similar expenses" also extend the purposes for which this indebtedness was incurred far beyond those that had been specified. The court below, therefore, has not only undertaken to except indebtedness from the plain terms of the constitution, by calling it *compulsory*, but has actually nullified the entire provision by substantially treating the entire indebtedness of the county as being of this character. The court below, by the decision in this cause, attempts to validate bonds to the amount of five hundred thousand dollars, together with accumulated interest. In the cause submitted with this one the court has rendered judgment for nearly fifty thousand dollars more, altogether irrespective of any inquiry as to the purposes for which the warrants in suit were issued. In addition to this the agreed statement in the other cause shows judgments against the county for about one hundred and thirty thousand dollars, and there were outstanding bonds for court house, roads and bridges amounting to fifty-five thousand dollars. To specify other indebtedness of this county would be to travel outside of the record, and this we will not do. When

we consider that the entire indebtedness that could be contracted under the literal terms of the constitution, upon the valuation of 1881, would be about sixty thousand dollars only, and when we then contemplate the enormous burden of indebtedness that, if validated by this court, has been, through the mismanagement, extravagance and fraud of county officials, cast upon the people of this county, we can get a very clear vision of the importance and necessity of a constitutional limitation, and the utter failure of the people of this state under this construction, to place around themselves any efficient safeguard against the shameful abuse of their credit.

The court not only holds that all the warrants issued for the purposes specified in the agreed statement were executed upon compulsory obligations, but presumes that those issued for other *county expenses* and other *similar purposes* were, also, executed upon obligations of this character. We have seen that the first holding was erroneous, and we will now consider whether there is any such legal presumption as the one asserted. The court below said: "In 1591, Graham vs. Lake County, I looked over this agreed statement. It may be true that it does not come exactly within the scope of the opinion of yesterday (rendered in suit 2102, Frank W. Rollins vs. Board of County Commissioners of Lake County,) in that the indebtedness is not stated to be *all for these compulsory obligations;* and yet, it is stated generally that they were for this and *county expenses*, so that the county might issue a bond to pay those which were liabilities that could be enforced, *and the bond on its face not showing one way or the other, whether it was issued for one or the other, the presumption of the law being in favor of the validity of the bond*, the same judgment will be entered." The position here assumed by the court is, as we understand it, that there is no limitation upon the amount of indebtedness that may be con-

tracted by a county upon *compulsory obligations*, and that, the bonds, not showing *on their face* that they were issued for indebtedness, either in whole or in part, that was not of this character, are, as commercial paper, binding and obligatory in the hands of a holder for value. The bonds contain a recitation as follows: This bond is one of 710 funding bonds, each of like date, comprised in three series, designated "A," "B" and "C" respectively; series "A" consisting of 450 bonds for the sum of one thousand dollars each, numbered from 1 to 450, both numbers inclusive; series "B" consisting of 60 bonds, for the sum of five hundred dollars each, numbered from 451 to 510, both numbers inclusive; and series "C" consisting of 200 bonds for the sum of one hundred dollars each, numbered from 511 to 710, both numbers inclusive, the whole amounting to five hundred thousand dollars, which the Board of County Commissioners of said Lake county have issued under and by virtue of and in full compliance with an act of the general assembly of the state of Colorado, entitled "An act to enable the several counties of the state to fund their floating indebtedness," approved February 21st, 1881; and it is hereby certified that all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond. It is further certified that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of said county of Lake, voting on the question at a general election duly held in said county on the 8th day of November, A. D. 1881. The faith and credit of the county of Lake are hereby pledged for the punctual payment of the principal and interest of this bond. The questions that arise upon this recitation are (1) is there any presumption of law that *all* of the warrants that were funded by these bonds had been issued for *compulsory* obligations, (2) if so is this presumption

conclusive, and, (3) if there is such a presumption, but it is not conclusive, and the contrary is shown as to a large portion of such warrants, then what effect does this have upon the validity of the bonds?

There is nothing in these bonds that can be given the effect of a recital either that they were issued for warrants that had been executed for compulsory obligations or that the bonds or warrants were within the limitation prescribed by the constitution. The mere fact that bonds were issued, where they contain no recitals bringing them within the limitation of indebtedness fixed by the constitution, is not proof, in favor of a *bona fide* holder even, that the circumstances existed which authorized them to be issued. (Buchanan vs. Lichfield 102 U. S. 278; Carroll County vs. Smith 111 U. S. 556). It would follow that where the bonds on their face show that they were issued for an amount of indebtedness that is beyond the constitutional limitation, unless issued for a *particular character of indebtedness*, and there is no recital as to the character of the indebtedness or the constitutional limitation, there would be no legal presumption in favor of the bonds.

But even if there is such presumption, it could not, in the very nature of the case, *be conclusive*. It is clear and certain that if the bonds in question were issued for indebtedness that was partly compulsory and therefore constitutional, and partly contractual and therefore unconstitutional, this fact may be shown by way of defense to an action upon the bonds. (Dixon Co. vs. Field 111 U. S. 85). The funding act (Session Laws Colo. 1881 p. 85) authorized the funding of the outstanding warrants of the county. No judicial power was or could have been vested in the board of county commissioners to determine any question as to the validity of these warrants. Every bond showed upon its face that it belonged to an issue largely in excess of the constitutional limitation unless

the entire issue was for a particular class of warrants. As to whether this was the fact neither the funding act nor any recital in the bond gave any information. A fair inference, however, to be drawn from the funding act would be that no distinction was observed in issuing the bonds respecting the nature of the original obligations upon which warrants had been issued. If the construction given to this constitutional provision in the cause submitted with (and applied in) this one, shall be held to be the true meaning of the constitution, then it must be presumed that every one knew the law, and that these bonds were taken with notice that they could not be issued beyond the constitutional limitation unless the warrants funded belonged to this special character. This would place the public on inquiry as to the real character of such warrants. It clearly appears, as we have already seen, that a large portion of these warrants were issued upon indebtedness that was in no manner or degree compulsory, and there being no estoppel against the consideration of this fact, the question then arises as to the effect upon the validity of the bonds of including these invalid warrants.

We submit that the necessary effect of issuing these funding bonds without reference to any distinction as to the purpose for which the warrants had been issued (even if any such distinction exists) is to render *void* the entire issue. A contract illegal in part and legal as to the residue, is void as to all, when the two parts cannot be separated. One entire consideration cannot, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal. (Bishop Con. Sec. 471 and note; 3 Amer. and Eng. Ency. Law 887; Pueblo etc. vs. Taylor 6 Colo. 1). If the legal part can be separated from the part that is illegal the former may be enforced. (Gelpcke vs. Dubuque 1 Wall. 220; United States vs.

Hodson 10 Wall. 395; Oregon etc. vs. Winsor 20 Wall. 64; United States vs. Bradley 10 Pet. 343). In Henderson vs. Palmer (71 Ill. 579) the court said: "As a general rule, if any part of an entire consideration for a promise, or any part of an entire promise, be illegal, *whether by statute or at common law*, the whole contract is void." These warrants, many of them at least, were issued in violation of the constitution. All such transactions were illegal. The officers issuing them and the parties receiving them were *particeps criminis*. Five hundred thousand dollars of bonds were issued as one act. It would be impossible to follow each warrant and identify the particular bond that it entered into. In an action upon any particular bonds or coupons it would, then, be impracticable to separate the legal from the illegal items of indebtedness for which they were issued. The result is that the entire issue of bonds must be held invalid, and the plaintiff remitted to an action upon such warrants, if any, as he can allege and show were issued within the constitutional limitation.

All that has been heretofore presented has been by way of further defense to these bonds and chiefly applicable only in the contingency that the court entertains the alleged distinction made by the court below respecting contractual and compulsory obligations. If this distinction is not recognized then how will the case stand? In the agreed statement it is stipulated as follows: "It is further stipulated and agreed that if section six of article eleven, of the constitution of the state of Colorado, be construed to be a limitation upon the power of the defendant county to contract *any and all indebtedness, including all such as that sued upon in this action*, then it is admitted that the claimed indebtedness sued on herein was incurred *after* the limitation prescribed by said constitution had been *reached and exceeded* by the said defendant, the county

of Lake, and in the event of such a construction, by this court, or the Supreme Court of the United States, then and in that case, and for the purposes of this action, it is hereby also admitted that the defendant is entitled to judgment thereon unless the defendant is estopped from making such defense by the recitals contained on the face of such bonds and coupons sued on in this action. It is understood, however, that this stipulation is made for the purposes of this action only and shall in no wise affect the rights of any person in any future action in law or in equity brought on said warrants." Thus we see that, in the event that said distinction is repudiated by this court, all questions as to the invalidity of these bonds, and the facts upon which the same rest, are ended, unless there is something arising, by way of estoppel, upon the face of the bonds.

We can discover nothing contained in these bonds that creates any estoppel against the defense that they were issued in violation of this provision of the constitution. Every bond shows upon its face an amount of alleged indebtedness that could *not exist* under the constitution. In Dixon County vs. Field (111 U. S. 63) this court said: "In determining the limit of power there were necessarily two factors: the amount of the bonds to be issued, and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was eighty-seven thousand dollars (in the present case five hundred thousand dollars). The amount of the assessed value of the taxable property in the county is not stated, but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmet-

ical calculation. No recital involving the amount of the assessed valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself (and there was no such recital in the bonds in controversy), for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power." In Buchanan vs. Lichfield (102 U. S. 278) this court also said: "The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city." The principle of these decisions was recognized in the case of Daviess Co. vs. Dickenson (117 U. S. 657).

The bonds contain a recital that their issue was authorized by a vote of the people, and that all the provisions and requirements of the act of February 21, 1881, had been fully complied with by the proper officers in the issuance of the bonds. This constitutes no assertion with reference to the constitution. A compliance with the act in question does not import a compliance with law generally, or with the constitution. But even if the officers of the county had undertaken to recite that the bonds were issued according to the constitution and the law there would have been no estoppel. In Katzenberger vs. City of Aberdeen (121 U. S. 172), this court said: "But it is insisted that the city is estopped, by the recital of the bonds, from denying that they were lawfully issued. The recital is, in effect, that they were issued under and pursuant to law, the charter of the city, and the ordinance of April 26, 1870. As has been seen, neither the charter, nor any other law of the state, conferred in express terms power on the city to issue these bonds under any condition of facts. The ordinance of the mayor and

selectmen directing their issue is not of itself enough. Legislative authority, express or implied, to pass the ordinance must be shown. The recital, therefore, in its present form, is of matter of law only, because it implies the existence of no special facts affecting the case, except the issue of the bonds under the ordinance to pay the subscription to the stock without any vote of the electors to be taxed therefor. It is, in effect, nothing more than a recital that bonds issued under such circumstances were under and pursuant to law and the charter of the city. Such a recital does not estop the city from asserting the contrary. To hold otherwise would be to invest a municipal corporation with full legislative power, and make it superior to the laws by which it was created." There is nothing in the funding act under which these bonds were issued, a compliance with which would import that they were issued within the constitutional limitation.

These bonds were, as we have stated, all issued at one time and as one official act. If the issue would swell the indebtedness of the county beyond the constitutional limitation, then the entire issue would be void. It would be impossible to arrive at any calculation or basis upon which any portion of the bonds could be held to be within the limitation. If any of them were issued within such limitation it would be impracticable to separate and distinguish between the legal and illegal parts. In Buchanan v. Litchfield (102 U. S. 278), this court said: "The authority, therefore, conferred by the act of April 15, 1873, to incur indebtedness in the construction and maintenance of a system of water-works, could have been lawfully exercised by a city, incorporated town or village, only when its liabilities, *increased by any proposed new indebtedness*, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution

expressly declared it should not be allowed to incur. If, therefore, it appears, by evidence of which the city may rightfully avail itself as against a *bona fide* holder, for value, of the coupons in suit, that the bonds issued January 1, 1884, *created an indebtedness in excess* of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued." This excludes all inquiry as to whether some small portion of an issue of bonds might not be within the limit. But this question does not arise upon the facts of this cause. The agreed statement of facts clearly concedes that the claimed indebtedness sued upon in this action was, as a matter of fact, unless their construction of the constitution is sustained, incurred after the limitation prescribed by the constitution had been reached and exceeded, and that, if the constitution is construed as a limitation upon *all* indebtedness, then judgment should have been entered for the defendant below; and, therefore, the judgment, as entered, should be reversed.

DANIEL E. PARKS and
H. B. JOHNSON,
Attorneys for Plaintiff in Error.

FILED.
DEC 17 1887
JAMES. H. McKENNEY.
CLERK.

In the Supreme Court

Of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO,
Plaintiff in Error,
vs.
BENJAMIN GRAHAM,
Defendant in Error.

No. 1265.

BRIEF FOR DEFENDANT IN ERROR.

ROBERT E. FOOT,
WILLARD TELLER,
Attorneys for Defendant in Error.

WHIPPLE & PIERSON, LEGAL PRINTERS, DENVER, COLO.

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No. 1265.

BRIEF FOR DEFENDANT IN ERROR.

This cause is by stipulation, on file, to be argued and submitted under rule 20, in connection with No. 1347, and the argument and points made in that case are, in so far as applicable, to be taken as a part of the argument in this case. We, therefore, call attention to the state of the record, the character of the finding, and the exceptions taken in this case, and the record in this case being essentially the same as No. 1347, so far as the finding and exceptions thereto are concerned, we submit that the authorities, in that case cited, show that plaintiff in error has no exception or error upon which this Court can either reverse the judgment or review the decision and judgment

of the Court below, and so the judgment must be affirmed, and that, too, despite the fact that counsel evidently think this Court will not only review the finding of the Court below, but will, on such review, take counsel's interpretation of the statement of facts for what such statement was had, in order to arrive at the conclusion that the distinction between voluntary contracts and compulsory obligations is a "fantastic" one. But since defendant in error may not rely on opinion of counsel solely, as to what the judgment of the Court will be, we feel forced to notice briefly what we can but consider, an inadmissible argument, and as an argument entirely inadequate to show error in the judgment.

The questions submitted to the Court below for consideration by defendant in error, were:

First—The limitation on the amount of indebtedness a County could contract under Art. 11, Sec. 6 of the Constitution of the State of Colorado, was confined, by that section, to indebtedness *by loan*, and, hence, inapplicable to the bonds in question, because issued to fund the floating indebtedness of the County.

Second—The bonds were issued to fund an indebtedness incurred by the County in payment of liabilities imposed upon the County by the Constitution and the law of the State, and that the provision of the Constitution in question did not apply to that class of indebtedness.

Third—The County of Lake was estopped by the recitals in the bonds from denying their validity.

On the first proposition the Court below differed with counsel for the defendant in error, and yet counsel for the plaintiff in error are apparently so doubtful of the correctness of the Court's position on this proposition that they devote 58 pages, or 16,240 words of their argument (No. 1347, pp. 13–71) to it, which would indicate, at least,

they did not think our position was based on "fantastic distinction" or "fanciful theory" (No. 1265, argument of counsel, p. 7). The attention of the Court is respectfully directed, for our position under this proposition, to the brief filed in case No. 1347.

On the second proposition the Court below agreed with counsel for the defendant in error, we feel disposed, therefore, to be considerate towards counsel for plaintiff in error for devoting the balance of their argument, consisting of 39 pages, beginning with the word "subsequent" and ending with the words "*vox Dei*" (No. 1347, arg., pp. 72–111), to this proposition.

The third proposition was not considered, as the Court below, by its position on the second proposition, rendered the consideration of the third unnecessary.

Counsel for the plaintiff in error, it seems, desire to give the Court the impression that in this case the agreed statement of facts was entered into merely by way of "inducement" "for the purpose of arriving at the relation that existed between the indebtedness and the assessed valuation of the taxable property of the County" (No. 1265, Arg., pp. 6, 7). We state, without hesitation, the agreed statement of facts was entered into, that all the issues might be tried and determined by the Court without a jury, and that the judgment of the trial Court, on all questions of fact, is as conclusive as though passed upon by a jury, and will not be questioned by an appellate Court, "unless there clearly appears to have been error or mistake."

The trial Court found as a matter of fact, from the evidence, that the bonds in question were issued for a class of indebtedness imposed upon the County by law, and as a matter of law that the provisions of the Constitution in question did not apply to this class of indebtedness; we confidently believe that this Court, after an examination

of the agreed statement of facts relating to what this indebtedness was for, (Trans. of record pp. 13–21), will not disturb the finding of the trial Court as to its conclusions of fact, in this matter, and will consider only the correctness of the conclusions of law deduced therefrom.

That the Court was right in its conclusions of law, we respectfully refer to the position on this proposition in brief in No. 1347.

Counsel for plaintiff in error tries to force upon the Court the question of the validity of these bonds by reason of the recitals contained in the bonds, and we respectfully call the Court's attention to the position taken by us, on this point, in the Court below.

The legislative act under which these bonds were issued (General Statutes of Colorado, 1883, p. 288, Sec. 1156), after providing for the usual steps for the submission of the question of the issuing of the bonds to the taxpayers of the County, provides as follows:

"The whole amount of bonds issued under this act shall not exceed the sum of the County *indebtedness* at the date of the first publication of the above mentioned notice, and *the amount shall be determined by the County Commissioners* and a certificate made of the same and made a part of the record of the County, and any *bond issued* in *excess of said sum* shall be null and void," etc.

The county performed all the duties required of it by this act. (Trans. of record, agreed statement, pp. 17–21.)

The County Commissioners, by virtue of the power vested by the act, found the indebtedness of the county to be five hundred thousand dollars, and the fact is so recited in the bond. (*Id.* ref.)

By this act it is clear the County Commissioners were invested with the power to ascertain, determine upon, and fix the *amount of the indebtedness* for which the bonds could issue. We therefore think these bonds belong to that class

of bonds which come within the rule of this honorable Court, so clearly enunciated in case of Town of Colorado vs. Eaves, 92 U. S., opposite p. 491, to wit: "Where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds, issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact of the appointed tribunal."

We also cite New Providence vs. Halsey, 117 U. S., p. 336; Oregon vs. Jennings, 119 U. S., opposite p. 92, and maintain the cases cited by counsel for plaintiff in error support our position.

Aside from professional duty, we warmly concur with His Honor Judge Brewer, that "honesty, justice, and all potential obligations of a solemn promise, demand that they be paid." (Trans. of record, p. 31.)

ROBERT E. FOOT,
WILLARD TELLER,
Attorneys for Defendant in Error.

In the Supreme Court

Of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, Plaintiff in Error, vs. BENJAMIN GRAHAM, Defendant in Error.	No. 1265.

REPLY OF PLAINTIFF IN ERROR.

The bonds in question were issued under an act entitled "an act to enable the several counties of the state to fund their floating indebtedness," approved February 21, 1881. (Session Laws 1881 p. 85). In order to fully comply with rule twenty-one of this court we copy this act in full, as follows:

SECTION 1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding ten thousand dollars, upon the petition of fifty of the electors of said counties (county), who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish for the period of thirty days, in a newspaper published within said county, a notice

requesting the holders of the warrants of such county to submit, in writing, to the board of county commissioners, within thirty days from date to the first publication of such notice, a statement of the amount of the warrants of such county, which they will exchange at par and accrued interest, for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners, at the next general election occuring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county, who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county, who shall have paid taxes on property assessed to them in said county, in the preceding year, the question whether the board of county commissioners shall issue bonds of such county, under the provisions of this act, in exchange, at par, for the warrants of such county, issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose, at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish, for the period of at least thirty days immediately preceding such general or special election, in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid, at such election. The county treasurer of such county shall make out and cause to be delivered to the judges of election, in each election precinct in the county, prior to the said election, a certified list of the tax-payers in such county, who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the

ating county indebtedness shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants, issued prior to the date of the first

publication of the aforementioned notice, coupon bonds of such county in exchange therefor, at par. No bonds shall be issued of less denomination thaa one hundred dollars, and if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent. per annum. The interest to be paid semi-annually, at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county, after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same, and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond.

SEC. 2. All bonds which may be issued under the provisions of this act, shall be signed by the chairman of the board of county commissioners, countersigned by the county treasurer of the county, and attested by the clerk of said county, and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose by the county treasurer, in the order in which they are issued; each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance.

SEC. 3. The county commissioners shall be authorized to prescribe the form of such bonds, and the coupons thereto, and to provide for the half-yearly interest accruing on such bonds actually issued and delivered; they shall levy annually a sufficient tax to fully discharge such interest, and for the ultimate redemption of such bonds, they shall levy annually, after nine years from the date of such issuance, such tax upon all the taxable property in their county, as shall create a yearly fund equal to ten (10) per cent. of the whole amount of such bonds issued; which fund shall be called the redemption fund. And all taxes for interest on and for the redemption of such bonds, shall be paid in cash only, and shall be kept by the county treasurer as a special fund, to be used in pay-

ment of interest on and for the redemption of such bonds only; and such taxes shall be levied and collected as other taxes.

SEC. 4. It shall be the duty of the county treasurer, when there are sufficient funds in his hands to the credit of the redemption fund, to pay in full the principal and interest of any such bonds, immediately to call in and pay as many of such bonds and accrued interest thereon, as the funds on hand will liquidate, as hereinbefore provided. Such bond or bonds shall be paid in the order of their number; and when any bonds or coupons issued under this act are taken up, it shall be the duty of such treasurer to certify his action to the board of county commissioners, who shall cancel the same, so that they can be plainly identified, and cause a record to be made of the same; and when it is desired to redeem any of such bonds, the county treasurer shall cause to be published for thirty days, in some newspaper at or nearest the county seat of the county, and in a newspaper published in the city of Denver, a notice that certain county bonds, by numbers and amounts will be paid upon presentation, and at the expiration of thirty days such bonds shall cease to bear interest.

SEC. 5. All persons voting on the question as hereinbefore provided, shall vote by separate ballot, which shall be deposited in a box to be used for that purpose only, and on which ballot shall be printed the words, "For funding county debt," or "Against funding county debt;" and if, upon canvassing to [the] vote, (which shall be canvassed in the same manner as the vote for county officers) it shall appear that a majority of all the votes cast upon the question so submitted, are for funding the county debt, then the county commissioners shall be authorized to carry out the provisions of this act, and the canvassing board shall certify the vote, and it shall be made a part of the county records. The judges of election shall make and certify to the clerk of the county, a separate list of the names of the electors voting upon the question of the funding of the county indebtedness, in the order in which the ballot of the elector so voting is received, and each ballot shall be numbered in the order in which it is received, and the number recorded and [on] the said list of voters opposite the name of the voter who presents the ballot.

SEC. 6. As soon as possible after such election, if the

bonds shall be voted, the officers herein mentioned and authorized, shall proceed to execute the provisions of this act.

SEC. 7. All acts, or parts of acts in conflict herewith, are hereby repealed.

SEC. 8. That inasmuch as several counties now have a large floating indebtedness and would be very much benefitted by the immediate passage of this act, it is the opinion of this general assembly that an emergency exists; therefore this act shall be in force and take effect from and after its passage.

Approved February 21, 1881.

We have read the argument of counsel for defendant in error, filed in this case, and find little therein to which to make reply. They close by making a quotation from that portion of the opinion of the court below, wherein the court says: "This is not the case of a series of bonds issued to a railroad corporation whose existence and work are, notwithstanding it is called a *quasi* public servant, we all know, prompted by personal and selfish interests, but it is the case of warrants issued to many individuals, witnesses, jurors, constables, sheriffs, and the like, called upon by the laws of the state to render some public service in the administration of justice, the punishment of crime, the preservation of the public peace, the conduct of elections,—matters in which the state as a whole is interested and which conduce to the general welfare,—and who have obeyed the mandates of their state in the undoubting faith that the promised compensation for their services would be paid. Honesty, justice, and all the potential obligations of a solemn promise demand that they be paid; and if I have lent a too-willing ear to the voice of such appeal, and have permitted such equities to blind my eye to a clear vision of the literal mandate of the constitution, it is consolation to know that the amount in controversy is so great that a review of these proceedings can be had in the supreme court of the United States, by

which high and ultimate tribunal any errors and mistakes can be corrected." It is certainly *discreditable to the judiciary* of the United States that any such *cheap demagoguery* as this should be promulgated in a solemn judicial decision, and it is painful to us to see the same thing reiterated by reputable gentlemen of the bar. If the court below believed that its construction of the constitution was correct, then it should have been given without apology; but, if it did not really believe that its construction was correct, then its apology cannot be accepted. All of this *unseemly gush* is misplaced in principle and false in theory. No high-minded and law-abiding citizen, attending court as a witness or rendering some service as an officer, and thus assisting to maintain law and order in the community in which he lives, would wish to see the constitution violated in order that he should be paid. On the contrary every such citizen would rather render such necessary public service gratuitously until such time as legislative power can and does make the necessary provision for such services by current taxation. In reply to the line of argument voiced by the court below, and the suggestion that to enforce the constitution as it is plainly written is to sanction repudiation, the supreme court of the state, in People vs. May (9 Colo. 80) said: "Nor is there any just force or propriety in the argument of repudiation. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them. * * County authorities, as well as all persons dealing with them, must take notice of the limit which the people in their constitution have prescribed for the county indebtedness. No plea of ignorance or hardship can be allowed to avail. To afford security the rule must be inexorable. If the argument of repudiation is to prevail, then every constitutional limitation against incurring indebtedness, whether

state, county or city 'is a sounding brass and tinkling cymbal.' Its violation in every instance would supply the reason for not enforcing it, because to enforce it would deprive parties of benefits arising from its violation, and this would be repudiation." In Bound vs. The Wisconsin Central Railroad Company (45 Wis. 543, 568) Ryan C. J. said: "The distinguished gentleman who represented the bondholders on the argument, warned the court, with great emphasis, against repudiation. That is the *key-word of the cant of speculators in questionable public securities.* It was hurled at this court when it rendered just judgment upon sound principle in (mentioning several cases). That word of reproach, any such word of reproach, can have no influence *on the mind of any judge fit to hold his office.* It is as much the duty of courts to avoid illegal, as to enforce legal contracts. Courts have nothing to do with the *consequences* of judgments rendered on settled principles of law. Far better that these bondholders should lose their money invested in these bonds, than that *principles of judicial decision* should lose their control of the judgments of the court. It is the strict duty of this court to pass upon the validity of the statute under which the bonds in this case were issued, upon fixed rules of judicial decision, in disregard of all outcry from counsel, clients or others. * * *Unfortunate the court wanting in courage to declare unpalatable right, against pretentious, plausible, wrong.*" In the light of these great principles and noble sentiments, the court below had nothing to do with the alleged "undoubting faith" with which men received warrants issued in flagrant disregard of the constitution. If considerations such as those that apparently dictated or influenced the decision of the court below, shall control the action of courts generally then *justice,* "instead of being settled on a *stable throne,* would become an *ignis fatuus,* tantalizing and mocking her followers, *by continually*

eluding their grasp." We do not consider it necessary to dwell upon this feature of the case. Constitutional limitations of indebtedness are a matter of *high public policy.* They should be fairly construed and enforced *regardless of consequences.* We have no apprehension that they will be considered in any other light, or construed in any other manner. Our "undoubting faith" as to this is based upon the dignity and character of this tribunal, and its former expressions on the subject. (Buchanan vs. Litchfield 102 U. S. 278; Litchfield vs. Ballou 114 *id.* 190).

If the issue of bonds, or any portion thereof, from any of which the coupons in suit were taken, were executed after the limit of indebtedness prescribed by the constitution had been reached and exceeded, then they are void. If the warrants or any portion of them, for which these funding bonds were issued, were drawn after such constitutional limit had been reached and exceeded, then the *entire issue* of bonds would be void. In Millerstown vs. Frederick (112 Pa. St. 435) the court said: "This was the very evil which the constitutional provision was intended to prevent. The municipal officers had no power to create such a debt, and they could not by any contrivance, whatever, bind the borrough for payment of it. *It is, of course, impossible to distinguish the valid from the invalid portion of the debt secured by the bonds; the transaction involved in the issue of the bonds is entire and indivisible, and, therefore, the whole is invalid.*" As we have submitted some views and some authorities upon this question in our opening argument in this cause (pp. 17–18), and as we think this principle has been fully recognized and acted upon by this court (Buchanan vs. Litchfield 102 U. S. 278; Dixon County vs. Field 111 *id.* 63; Daviess County vs. Dickenson 117 *id.* 657; Katzenberger vs. City of Aberdeen 121 *id.* 172), we will pass the subject without further consideration.

The counsel for defendant in error contend that we are estopped, by the recitals of the bonds, from pleading and showing that the bonds, or the warrants for which they were executed, were issued beyond the constitutional limit of indebtedness, and cite the cases of Town of Coloma vs. Eaves (92 U. S. 484); New Providence vs. Halsey (117 *id.* 336), and Town of Oregon vs. Jennings (119 *id.* 74) to sustain their contention. We shall not analyse the decisions in these cases, as their inapplicability to the question under discussion is *patent.* Counsel do not seem to understand the distinction between law and fact, and the resulting distinction between a recital of a fact and an attempt (even if any had been made) to adjudicate, by a recital, as to questions of law. The bonds contain no recital of fact which we now seek to contradict. Each bond recites upon its face that it belongs to an issue of bonds amounting to five hundred thousand dollars; that it was issued under and by virtue of a full compliance with the said funding act, and that this issue of bonds had been authorized by a vote of the people of the county. There is no general recital as to the validity of the bonds. The validity of the bonds would depend on the validity of the original indebtedness, unless a distinction is made unfavorable to the validity of the bonds, even though the original indebtedness was valid, on the ground that the execution of the bonds was a new contract, and, in its very nature, *purely voluntary.* As to the nature of this funding act and certain bonds issued thereunder, the court in Potter vs. County of Chaffee (33 Fed. Rep. 614) said: "In pursuance of that act, the county of Chaffee issued these bonds, which contain full recitals, showing compliance with all the provisions of that act. It is unnecessary to read them. And the question is, whether the county is not estopped by those recitals from presenting this defense. The act does not limit the issue

of bonds; that is, it does not place any amount, any numbers, as the limit which any county may issue. It authorizes the funding of the floating indebtedness. Of course, that means the valid indebtedness. It gives to the county commissioners the duty of issuing these bonds, and exchanging them at par for the outstanding warrants; and the limitation, and the only limitation, placed in the act, is that the whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the notice, and that amount is to be determined by the county commissioners, and a certificate made of the same, and made a part of the records of the county. The duty is placed upon the county commissioners of determining the amount. The legislature does not prescribe it. This bond, which purports to be one of a series, nowhere upon its face contains any statement of the amount of bonds issued, or to be issued, by that county; no one upon examination of one bond could say whether one thousand or a hundred thousand dollars were, or were to be, issued by the county. It refers to the act, declares it is issued in pursuance of the act, and upon the proper election having been held." In Buchanan vs. Litchfield (102 U. S. 278) this court said: "Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not at the time exceed the constitutional limitation, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital, or statement, as to the extent of the existing indebtedness." But no inference favorable

to the validity of a bond could be drawn from any such recital where the bond shows upon its face that it belongs to an issue that in itself, and irrespective of any other existing indebtedness, creates an indebtedness that could not possibly exist under the constitution. In Bank vs. Porter Township (110 U. S. 608) this court said: "The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and where the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it." In Anthony vs. Jasper Co. (101 U. S. 697) this court stated the principle upon which we rely, as follows: "If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of the execution; but if there is a want of power no legal liability can be created." The power itself cannot be created by a recital; it must exist in the law. No recital can change the constitution or the law. If the county of Lake could not, under the constitution, by one distinct and indivisible act, issue five hundred thousand dollars of bonds, then no such power can be exercised, and inquiry as to its validity concluded by a recital. If the legislature had passed an act authorizing this county to issue five hundred thousand dollars of bonds, and had recited that this issue would be within the constitutional limitation, it would have been a nullity.

It would, at least, have been but a legislative construction of the constitution, and this would not control the judiciary. And a recital in a bond that this amount of indebtedness was within the constitutional limitation would be nothing more than a legal opinion upon facts also recited which would show that the opinion is fundamentally erroneous. But neither the act nor the bonds contained any recital upon the subject. The act authorized the board to ascertain the amount of the floating indebtedness, but not to adjudicate respecting its validity, and no attempt was made to adjudicate or recite anything respecting the validity of the old indebtedness; and nothing of this kind is to be implied from what is recited. (Independent School District vs. Stone 106 U. S. 183). Undoubtedly a bond is valid if the recitals thereof, taken and construed together, fairly import a valid issue (Dallas County vs. McKenzie 110 U. S. 686; Marcy vs. Oswego 92 *id.* 637; Humboldt vs. Long *id.* 642; Wilson vs. Salamanca 99 *id.* 499), but such recitals must be clear and unambiguous (Independent School District vs. Stone 106 U. S. 183) and confined to matters of fact and not extend to questions of law. (Northern Bank of Toledo vs. Porter Township 110 U. S. 608; Dixon County vs. Field 111 *id* 83; Carroll County vs. Smith 111 *id.* 556). The principle is universal that the law cannot be established by a recital, and that any holder of a municipal bond is chargeable with notice of what the law is. (Marsh vs. Fulton County 10 Wall. 676; East Oakland vs. Skinner 94 U. S. 255; South Ottawa vs. Perkins *id.* 260; Dallas County vs. MacKenzie *id.* 660; Wells vs. Supervisors 102 *id.* 625; Ogden vs. Daviess County *id.* 634; Hayes vs. Holly Springs 114 *id.* 120; Merchant's Bank vs. Bergen County 115 *id.* 384).

The case of Independent School District vs. Stone (106 U. S. 183) is very analagous to the one before the court. This court, after quoting the provision of the Iowa con-

stitution prescribing a limitation of municipal indebtedness, said: "The largest indebtedness, therefore, which the plaintiff in error, consistently with the fundamental law of the state, could have had, when the bonds were issued, was five per cent. on $47,986. Consequently, the bonds now in suit, *constituting one issue*, and aggregating $15,000, must be held to have been made *without authority of law*, and, upon well established principles, are not *enforceable* obligations against the district, unless it is estopped by recitals in the bonds from showing, as against a *bona fide* purchaser, the value of its taxable property as disclosed by the last state and county tax lists previous to the creation of the debt. * * * But the recitals do not, as we have said, necessarily import a compliance with the statute or the fundamental law of the state on the subject. They *necessarily imply* nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained, and yet it may have been disregarded in respect of the *limit it imposed* upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute does not, with *sufficient distinctness*, imply that the indebtedness voted was less than five per cent. on the value of the taxable property of the district, as shown by the state and county tax lists." In the case just quoted from the statute required all indebtedness to be within the five per centum of the valuation, the same as the constitution, while in the case before the court there was no attempt to make the funding act conform with the constitutional limitation. In the cases of Bates vs. Independent School District (25 Fed. Rep. 192) and Nesbit vs. Independent School District (*id.*

635) the court gave some very clear and satisfactory expositions by way of application of the decisions of this court, upon the subject under consideration, to the limitation as prescribed by the constitution of Iowa.

The indebtedness created by the issuance of these funding bonds can be considered, and its validity determined, as a *new indebtedness* standing upon a *new contract*, or as a mere evidence of an *old indebtedness*, based upon the *original* considerations upon which the warrants which were retired were issued. In Jasper County vs. Ballou (103 U. S. 745) this court said: "There must be a time when the people, in their political capacity, are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as '*properly authorized by law*' for the purpose of negotiating a *settlement* with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended. This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not *increase the aggregate of the indebtedness of the corporation, but only changed its form*," We do not understand that the court, in the decision from which the above quotation is made, was intending to recognize or announce any *general proposition* that a county, by the mere issuance of *funding bonds*, estops itself from questioning the validity of the *original indebtedness*, upon the ground that it was issued in excess of the constitutional limitation. In that case it was not claimed that the bonds which were retired by the funding bonds were issued in excess of such limit. The infirmity of the *original bonds* consisted of a mere irregularity in the election by which they were au-

thorized. The funding act only authorized the funding of *binding and subsisting legal obligations which had been properly authorized by law*, and this was to be done upon a vote of the people. "All outstanding bonds were not to be taken up in this way, but only such as were recognized by the people, acting together in their political capacity at an election for that purpose, as binding and subsisting obligations." Upon this state of facts this court held that the county was estopped from alleging the invalidity of the original bonds by reason of such *irregularity* in the *election* by which they were authorized; and, as to the suggestion that the funding bonds carried the indebtedness beyond the constitutional limit of five per centum of the value of the taxable property of the county, as ascertained by the last preceding assessment, it was held that the funding bonds did not create any *new indebtedness*, but merely changed the form of the *old* indebtedness, to which this objection could not be made. The cases of Chandler vs. Town of Attica (18 Fed. Rep. 299), Hills vs. Peekskill Savings Bank (101 N. Y. 490), State vs. Wilkinson (31 N. W. Rep. 376) and State vs. Dakota County (35 *id.* 225), did not go beyond, if so far, as the principle of Jasper County vs. Ballou (103 U. S. 474.) This court has intimated, in several cases (Marcy vs. Oswego 92 U. S. 637; Humboldt vs. Long *id.* 642; Wilson vs. Salamanca 99 *id.* 499; Dallas County vs. McKenzie 110 *id.* 686), that a mere recital in a bond that the same is issued *according* to the constitution or *within* the constitutional limitation *works an estoppel;* but it seems to us that this view is *highly erroneous*, and not to be reconciled with general principles which have also been affirmed by this court. Such a recital clearly relates to *mixed* questions of *law and fact.* It not only imports a compliance, as a matter of *fact*, with all requirements relating to the duties of the officers who are to act in the premises, and who make the

recital, but it involves a *construction of the constitution.* It is not the province of officers performing ministerial or administrative functions only to place a construction upon the constitution, or adjudicate respecting the law, in such a manner as to conclude the county as to its legal and constitutional rights. If this can be done then constitutional limitations are *worse than useless* for a ready means is furnished by which they can be *nullified.* But, as we have seen, there has been no such recital made in the bonds under consideration, and an estoppel, if there is one, must stand on the *naked fact* that the people, by a vote, have authorized the issuance of these funding bonds. We know of no adjudication sustaining any such principle of estoppel. Such an estoppel would have to stand upon the principle of a *ratification*, and no act can be ratified where there was *no power* to perform the same *originally.* (Marsh vs. Fulton County 10 Wall. 676; Parkersburg vs. Brown 106 U. S. 487; Lewis vs. Shreveport 108 *id.* 282; Daviess County vs. Dickenson 117 *id.* 657; Hopper vs. Town of Covington 118 *id.* 148; Norton vs. Shelby County 118 *id.* 425). In Buchanan vs. Litchfield (102 U. S. 278) this court said: "The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds were issued, without any recitals of the circumstances bringing them within the limit fixed by the constitution, was, in itself, *conclusive proof*, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. *We cannot so hold.*" There can be no doubt but that, as a general rule, the invalidity of an indebtedness is not cured by the *mere act of funding* the same; and it is immaterial that such funding is authorized by a vote of the people of the county. Such vote cannot create an estoppel as against the county in its corporate capacity. In Weismer vs. Village of Douglas (64 N. Y. 91, 105) the court says: "It is urged

that there has been worked an estoppel, preventing the assertion by the defendant of the invalidity of the bonds. It is conceded by the appellant that where an act is beyond the scope of corporate power a municipality cannot be debarred from raising that objection by any subsequent conduct of its officers and agents. But it is contended that the inhabitants of the municipality may be estopped and bound by acts of acquiescence and approval, after knowledge of the facts, and their acts may thus affect the corporate body of which they are the *elements*. The *municipality* is the defendant here. The inhabitants are not parties to the suit nor to the bonds. Though the inhabitants of the place be incorporated, they are not the corporate body; the very object of the incorporation is to form a legal body, not to be affected in its duration by a change among the *constituent parts* of it. If it should be granted that the inhabitants may be estopped, that cannot affect the defendant; *it* is a political entity quite *different and apart* from the varying multitude who are from time to time the inhabitants of the territory within the corporate bounds. Their acquiescence cannot affect it. And if every one of the inhabitants of the village of Douglas who were *sui juris* at the time when the payments of interest were made upon them, had joined *affirmatively* in all those acts, that could not conclude the present population as a body, some of whom have, doubtless, come in since then, or come to majority since then, or in many other ways now come into the category of inhabitants." The same general principle was recognized by this court in Thomas vs. City of Richmond (12 Wall. 439) where the court said: "But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without

injury to third parties. This is necessary to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided to inflict the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do it at their peril." It has also been declared by this court that persons issuing and those receiving obligations in excess of a constitutional limitation are *in pari delicto*. And as to this, it could make no difference that a majority of the voters, voting at an election, had become a party to the wrong, or even that the same had been *unanimously authorized*. The constitutional limitation of indebtedness is not merely a protection to the people of a day—to those who may participate in a particular election—but is designed as a protection to the corporation itself, its changing population and the credit of the state which it forms an *integral part*. There was, in the issue of these funding bonds, nothing in the nature of a *settlement or compromise* of a disputed claim. Counsel for defendant in error, for their own purposes, have undertaken to show by the agreed statement of facts, and in their arguments, that no question had ever been raised in this state respecting any public indebtedness being affected by the constitutional limitation, prior to the case of People vs. May (9 Colo. 80).

There is not a word in the funding act that countenances any theory, that, by the issuance of funding bonds, a county was to engage in any *compromise* of indebtedness of *questionable validity*. The bonds were to be exchanged for warrants dollar for dollar. The only restriction upon their issuance was that they should not be in *excess* of the *warrant* indebtedness. Every bond, as we have seen, showed upon its face that it was a part of an issue that represented an amount of indebtedness that could not exist under the constitution; so that, whether we regard this five hundred thousand dollars of indebtedness as being created by the bonds, or as being originally created by the warrants and its form merely changed by the issuance of the bonds therefor, the constitutional objection applies, in its full force, thereto.

It was plainly stipulated in the agreed statement of facts that if the constitutional provision under discussion is construed to be a limitation upon the power of a county to contract any and all indebtedness, including such as that sued upon in this action, then it is admitted that the claimed indebtedness sued on herein was incurred after the limitation prescribed by the constitution had been reached and exceeded, and that defendant below was entitled to judgment, unless the recitals in the bonds worked an estoppel against the constitutional defense. We have seen that there is *no such estoppel*. The only remaining questions for discussion are (1) Is the constitutional limitation a limitation upon *any and all* indebtedness? (2) Is it a limitation upon *all such* indebtednes as that sued upon? An affirmative answer to the first question would seem to be logically an affirmative answer to the second. The court below, however, answered the first in the affirmative and the second in the negative. These questions have been somewhat fully discussed in Board, etc. vs. Rollins (case No. 1347, now pending in this court),

with which this case is submitted, but a few additional considerations may properly be stated. One of the principal objections urged by counsel for defendant in error to the construction making the constitutional limitation apply to indebtedness *for all purposes* is that the *limit is too low.* In answer to this objection we submit that the provision, under our construction, is *more liberal* than the one contained in the constitution of either Missouri or Illinois. The limitation in those states is fixed at five per centum upon the assessed valuation, *including existing indebtedness,* while the limitation in Colorado *excludes existing* indebtedness. This distinction is of *vast importance.* In Law vs. People (87 Ill. 385) it is shown in the opinion of Justice Scott (on page 407) that "prior to the adoption of the present constitution, the funded debt of the city of Chicago *exceeded the limitation* fixed by that instrument." This was true of many cities and counties in Missouri, and, doubtless, of other cities, and probably counties, in Illinois. We have submitted some observations upon this state of facts in our opening argument in case No. 1347 (pp. 30–34). How would the five centum limitation have worked in Colorado? The agreed statement of facts shows that at the time of the adoption of the constitution the assessed valuation of Arapahoe county (the county containing the city of Denver and having about one-third of the population and assessed valuation of property of the entire state) was $12,722,268 (Record, p. 54) and that it had an indebtedness of $850,000 for public buildings and subscriptions to railroads. (Record, p. 55.) It will be thus seen that the indebtedness of the principal county of the state exceeded seven per centum of the assesed valuation at the time the constitution was adopted. An examination of the agreed statement of facts, and a calculation made thereon, will also show that many other of the larger counties of the state were at the same time in-

debted largely beyond five per centum of their assessed valuation. As to all such counties the five per centum limitation of the Missouri and Illinois constitutions would have been, as it was in those states, an absolute prohibition against the incurment of any debt for any purpose. It will, therefore, be seen that, considering the manner in which the counties of the entire state would be affected, the limitation, under our construction, is less restrictive than those of the states that it most closely resembles.

The question as to whether a county remains liable for a tort, and liable upon judgments, irrespective of this constitutional limitation, reflects little, if any, light upon the main question. In Railroad vs. Osceola County (45 Iowa 168) the court said: "Can the validity of negotiable bonds of a county, issued in satisfaction of a judgment, in the hands of innocent holders for value, without notice of any claim that they are illegal for any cause, be questioned by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent., and that the board of supervisors fraudulently omitted to interpose the defense when the warrants were sued upon? This question differs from all those which have hitherto been determined involving the effect of section three, article eleven, of the state constitution. Upon mature consideration we are of the opinion that bonds so issued cannot be assailed in the hands of innocent holders for value. There is a presumption that those charged with public trusts act honestly and in good faith. The whole theory of the law rests upon this assumption." It is sufficient, without further quotation from this decision, to say that the conclusion reached by the court, upon this branch of the case, was founded, not upon a *construction of the constitution*, but upon the doctrine of *estoppel*. But we are not satisfied with this de-

cision, and are constrained to regard the powerful dissenting opinion of Beck, J. (*id.* p. 178) as being more consonant with *sound legal principle.* A majority of the court adhered to the principle of the decision in another case between the same parties. (52 *id.* 26). The presumption upon which these decisions rest has no application to the case before the court. There is no stronger presumption that counties will regard a constitutional limitation in the issuance of funding bonds than there is that they will do so in the contracting of indebtedness and the issuance of warrants in payment of the same. If the doctrine of estoppel should be carried to the extent of conclusively validating all indebtedness retired by these funding bonds, the court might just as well announce that the provision of the constution is *repealed.* No such doctrine is necessary to the protection of the syndicates who are dealing in public securities. Where there are no recitals with reference to the limitation of indebtedness they should be required to inquire whether or not such securities are being issued in defiance of the constitution. It would be destructive of the *high public policy* upon which these limitations are based to furnish a means to public officers, or to a mere majority of the people, by which, even without a recital upon the subject, they could be *effectively evaded.* Beyond this element of estoppel no case, holding that a county is concluded as to the constitutional defense, has gone. The estoppel is not created by the judgment, but by the issuance of bonds to pay the same. We have seen no decision to the effect that a judgment upon invalid warrants may not be assailed upon such equities as those alleged in these Iowa cases. In United States vs. New Orleans (98 U. S. 381) this court said: "In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which

they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed." There is nothing here that supports any proposition that indebtedness, merely because it is evidenced by a judgment, is an indebtedness that is not within the constitutional limit, or that the original indebtedness upon which a judgment is based, is excepted from the terms of the constitution. In the City of Bloomington vs. Perdue (99 Ill. 329) the court held that in an action on the case against a city to recover for a personal injury growing out of negligence on the part of the city, it cannot raise the question that it is already indebted to an amount in excess of the constitutional limitation, and the same view was asserted in Chicago vs. Sexton (115 Ill. 230), but in neither case was any reason given for the ruling. Neither does the court in Bartle vs. City of Des Moines (38 Iowa 414), nor in People vs. May (9 Colo. 404) give any satisfactory reason for excepting such liability from the constitutional limitation. In the latter case, however, the only reason that could be assigned therefor, is alluded to in an indirect manner; and it is assumed that the indebtedness contemplated by the constitution is that which "is reasonably anticipated as a result of voluntary action by the legislature or county authorities—such indebtedness as springs from express or implied contracts." In Louisiana vs. New Orleans (109 U. S. 285) this court held that a liability founded upon a

tort, was not a contract liability in the sense contemplated by the contract clause of the constitution of the United States. It is worthy of note that these decisions in Iowa and Illinois are rendered by courts which give their constitutional limitations a rigid and literal construction—one that embraces *all purposes.* Whatever reason this rule may be held to stand upon, it is clear that it can have no influence in arriving at a proper interpretation of a constitution as applied to the obligation created by a mere county warrant or funding bond.

We have already had occasion to call attention in our reply in the case with which this is submitted (p. 9) to the manner in which counsel for defendant in error have attempted to *manufacture history* to suit the exigencies of their cause. In their argument in that cause (p. 18) they say: "Now, nearly half the counties in the state have a registered warrant debt fully up to the limit claimed, the allowance of any and every account makes a debt beyond the limit, and by the assumption void, and the county officers of to-day must work for nothing, since no further debt can be incurred, and that is now the case in several counties." This is stated with a view of predicating upon the facts thus erroneously alleged, the argument *ab inconvenienti*—an argument that has no place in the construction of plain provisions of constitutions. (Chance vs. Marion County 64 Ill. 66.) In interpreting constitutions it is the duty of courts to ascertain and declare *the written law.* Consequences of interpretation are to be dealt with by the powers who *make* the written law. But if extraneous considerations are listened to, they should be *real* and not imaginary difficulties attending a *literal* construction. We are disposed to apologize for the *imagination* of counsel in view of the fact that their arguments were written near Christmas time, when the mind is naturally full of Santa Claus, hobgoblins and all manner of fairy

stories. But let us state the facts as the record shows them to be. The three decisions of the supreme court of the state were rendered respectively on March 26, 1886, December 24, 1886, and January 28, 1887. (Record pp. 62, 63.) At the time the last decision was rendered the legislature of the state was in session. That body at once proceeded to meet the exigencies of the situation by passing an act (Session Laws 1887 p. 240) by which *current revenues* could be drawn upon for *current expenses*, in accordance with the ruling of the court in People vs. May (9 Colo. 404). By this system it was not intended that the payment, in proper order, of any warrant which had been issued within the constitutional limitation should be dispensed with. (People vs. Austin 17 Pac. Rep. 485; Same Case 11 Colo.) At the same session an act was passed (Session Laws 1887 p. 27) by which an amendment to this provision of the constitution was submitted to the people. Upon this we have sufficiently commented in our reply in the other case (p. 12, 13.) At a previous session an act had been passed (Session Laws 1885 p. 318) authorizing an *additional tax* to meet any *unforeseen emergency*. What, then, would be the logical and necessary effect of these decisions and this legislation? Any one of *ordinary business capacity* can see that a condition of things would be produced quite the *reverse* of that portrayed by the counsel for the defendant in error. The indebtedness of counties in excess of the constitutional limitation being disposed of, and the power of taxation increased, no county in the state would find any difficulty in meeting any warrants issued within the limitation, and, at the same time, by slightly anticipating the actual collection of the revenues of the year not needed for this purpose, by the issuance of warrants drawn *specifically* thereon, to meet *current expenses*, a class of warrants, used for *all* current expenses, would come into use,

which, instead of being worth fifteen cents on the dollar, would be practically at par. When we suppose, as it is reasonable to infer the fact to be, that this system, thus inaugurated and carried on, is attended with that regard for *economy* that the lessons of the past tend to inculcate, no one can help but comprehend that the era of *economy*, and consequent *prosperity*, contemplated by the constitution, would necessarily come; and no one can fail to understand that any adjudication which will open wide the door to the old system of municipal *extravagance* would be a *grave public calamity*. Certain it is that if any *public inconvenience* had resulted from the legislation and adjudications which we have made an effort to sketch—such as would tend to justify a court in *overriding a plain constitutional provision*—some one other than the *zealous counsel of speculators in public securities* would have discovered the *fact*, and some *evidence of the fact* would have found its way into the *public annals* of the state. Its existence would not have to rest on *naked assertion*. It is apparent that this same line of argument was pursued before the supreme court of the state, and this before it had been denonstrated that *no inconvenience whatever* would result from an enforcement of the constitution; but the court said: "The hardships and inconveniences resulting from this construction are urged upon our attention. To such appeals the language of the courts is uniform. The meaning of a constitutional provision being plain, it must stand, be recognized and obeyed as the supreme law of the land." (People vs. May 9 Colo. 80). In determining whether a provision is *plain* or not, the language should be fairly read and rendered. The language should be *first* considered. Difficulties and doubts should not be *forced* into the plain terms of the language. When *expediency* furnishes the only light by which to read a constitution we will have

as many conflicting constructions as there are differences of opinion respecting measures. Counsel for defendant in error, in order to furnish another difficulty, proceed in their argument (p. 24) to manufacture another chapter of history by saying: "The undisputed fact in the case, and admitted here, is that the floating debt of *no* county in the state had ever at that time been the subject of comment—even as being burdensome." *No such alleged fact has been admitted.* An attempt was made in the agreed statement of facts (Record p. 43) to furnish an estimate of the floating indebtedness of the counties *exclusive* of the debts contracted for roads, bridges and buildings, and in aid of railways; but, as a floating debt can be and usually is created for the most of these excepted purposes, there remains no estimate in the record of the *entire* floating debt of the counties at the time the constitution was adopted. And most certainly there is nothing in the record to show that no *complaint* had been made, and no *apprehension* had been entertained, respecting *extravagance* in the administration of county affairs, from which a floating debt would be created. But even if it were true that no such complaint had been made, and no such apprehension had been entertained, this fact would furnish no criterion by which to construe the constitution. As to this question the court, in People vs. May (9 Colo. 80) said: "But, if we concede the *fact* as claimed, the *conclusion* drawn by no means follows. It will not do to say that an actual, existing, *antecedent* mischief is essential to support a constitutienal limitation, or an intent to limit; or that the absence of such an actual mischief excludes an intention to limit. On the other hand, it is safe to say that, wherever there is a power liable to be abused there is to be found a *legislative motive for restraint.* The multitudinous restraints of all constitutions proceeded largely against *possible mischiefs.* To leave powers unlimited

where there is great temptation to abuse is to *invite abuse.* The members of the convention were charged with the important duty of framing the fundamental law of the state. It was a grave responsibility. They were gentlemen of standing, character and ability; and many of them experienced in the administration of state and county affairs. It was their duty not only to provide against the recurrence of evils *patent and already experienced,* but also to guard every point where abuses were *liable to creep* into the administration of public affairs." It is sufficient, in conclusion upon this point, to say that the claim that there was nothing in the history and experience of the territory of Colorado, or in the history and experience of any of the states of the Union (which is presumed to have been within the knowledge of the framers of the constitution) to furnish a *legislative motive* for restraint upon the power of counties in the creating of a *floating* indebtedness is *supremely ridiculous.* The existence of a necessity for advancing any such *absurd theory* serves to *confirm,* rather than cast a doubt upon, the *letter of the written law.*

And still *more ridiculous,* if possible, is the claim that the framers of the constitution, in placing a limitation upon municipal indebtedness, did not intend to place any restraint, in this direction, *upon legislative power.* And when we show from the proceedings and address of the convention what was *their* real intention, we are met with the proposition that it is not the meaning and intention of the convention that we must seek for, but the meaning and intention of the people who adopted the constitution. (Brief in No. 1347 p. 45.) It is an insult to the intelligence of any court to ask it to *believe and declare* (or to declare without believing) that the great mass of the people who voted upon the adoption of this constitution, gave to the plain language of the provision in controversy, the narrow, technical and *highly artificial* construction con-

tended for by counsel for defendant in error, and sanctioned by the court below. The record shows that this construction was not suggested in the *earlier stages* of the litigation upon this subject—that it was an *afterthought.* If it took the learned counsel, with all their astuteness, as long as the record shows it did, to evolve a theory upon which to advance this construction, how long would it have taken for the electors of the then territory to have done it? And did we have a people here *sufficiently subtle and crafty* to accomplish a result requiring such powers of ratiocination? To answer these questions requires mathematical knowledge and occult powers beyond any that we possess. The *puerile excuse,* given for an assumption that any man of ordinary intelligence ought to know is unfounded in truth, is, that it could not be *foreseen* what the necessary expense resulting from legislative action would be, and, therefore, no attempt was made to restrain it. But if there is any well-grounded distinction (a proposition that we deny) between *compulsory* and *contractual* obligations, the amount required for one would be as uncertain, as difficult of discernment, and as much dependent on contingency, as the other. We suppose that obligations entered into for building court-houses, jails and other public buildings (although counties are required by law to have them) would be deemed *contractual,* but these may all be destroyed by fire, or otherwise, when a county is indebted to its utmost limit. By the very same reasoning that would except from the *plain terms* of the constitution *one class* of indebtedness *all classes* would be excepted, and the constitution would die of *too much construction.* In our opening argument in the other cause (pp. 94–95) we have shown from the debates of the convention that this question of *unforeseen emergencies* was fully considered, and that the limitation was intended to embrace *all extraordinary expenditures.* It would be im-

puting to the members of the convention a degree of inexperience and ignorance that is appalling, to assume that they did not know that a large proportion of the *ordinary indebtedness* to be incurred by counties results from the administration of the laws enacted by the legislature, and if they did know this fact, and had intended that all this indebtedness should be excepted from the provision in question, it is *inconceivable* that it would have been left for technical construction to have discovered the intent; *it would have been expressed in plain terms.*

The court below, by way of illustrating and impressing the argument respecting *unforeseen emergencies*, says: "I am advised by counsel that the suppression of a single riot in Leadville cost the county more than the entire proceeds of that year's levy. *These things cannot be foreseen.*" All that appears in the record upon this subject is an allegation in the replication respecting a labor strike that occurred in May, 1880. As this allegation, under the rules of pleading, stands denied, it was necessary to take the *statement* of counsel upon the subject Counsel for defendant in error, when giving this information, should also have advised the court that the labor strike amounted to an *insurrection* and led to a declaration of *martial law* by the governor of the state; that the expense thus incurred was an expense of, and to be assumed by, the state, and that the framers of the constitution *did foresee* that just such an emergency as this might occur, and excepted from the limitation placed upon the power of the state to contract indebtedness, and the power of the legislature to make appropriations, all expense of *suppressing an insurrection.* (Const. Art. 10 Sec. 16; Art. 11 Sec. 3). If the court below had given the entire constitution a little more careful examination and consideration, it may have come to the conclusion that the people of Colorado are capable of self-government, and that, therefore, its proceedings in

the direction of making a new constitution for their government were *unnecessary and gratuitous.* We cannot regard the case of Potter vs. Douglas county (87 Mo. 239) as furnishing much excuse for, or mitigation of, the decision of the court below. There are many fundamental distinctions between the constitutions of Missouri and Colorado, and between that case and the cases now before this court. In that case *necessity made the law*; the argument *ab inconvenienti* was allowed to prevail. Where no such necessity exists the argument does not apply. The legislation of Missouri required that the sheriff or jailor of any county should receive prisoners from another county that had no, or no sufficient, jail; that he should produce them before the proper court at the proper time; that he should be liable to a penalty for failure in this regard; that he should, also, be liable for contempt of court for such failure, and that he should be still further liable, for such failure, to be removed from office, and rendered incapable of thereafter holding the same. The county of Douglas sent certain prisoners to the county of Greene to be kept, boarded, clothed and produced before the proper court in Douglas county. This was done by the sheriff of Greene county and he produced a just account therefor. The constitution of Missouri provides: "No county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the *income and revenue provided for such year*, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose." In other words the constitution allows warrants to be drawn in anticipation of the actual collection of the revenues of the year, but not in excess of the same. Where a county is not already indebted to the extent of five per centum of the assessed valuation of the property, the indebtedness may be increased by such vote to that amount. At the time the

bill in question was presented to Douglas county, warrants had already been drawn for the full amount of the income and revenue for the year. It also appeared that the income and revenue of the county for a year was sufficient only to pay the current expenses of the county for the eight first months of each year, and that the income and revenue could not be increased in view of the limitation placed by the constitution upon the *power of taxation.* It is well settled that the drawing of warrants against and to the amount of the current revenues is not incurring an indebtedness (People vs. May, 9 Colo. 404) and hence, under the Missouri constitution, practically no indebtedness could be incurred without a two-thirds vote of the people. It may be conceded that this vote of the people cannot be relied upon for the payment of current and necessary expenses, for the people can not be coerced to take such vote or controlled with reference to the manner they should vote if one were taken. The constitution of Colorado allows a reasonable margin of indebtedness without any vote of the people and irrespective of the income and revenue provided for the year. In addition to this there is no restraint whatever upon the power of taxation. The facts of the Missouri case, giving rise to the *necessity* on which the argument *ab inconvenienti* is based, could not exist under the Colorado constitution. The Missouri case is founded upon the maxim, *lex non cogit ad impossibilia,* and to avoid imputing to the framers of the constitution and the people who adopted it "that which is morally impossible, which is contrary to reason, or, in other words, which could not be imputed to men in their right senses." Can any reasonable man pretend that any such *maxim* as this, or any such *rhetoric* as this, can be fairly used against our constitutional provision being construed as a limitation upon *general legislative power,* as well as the power of county officers in the

creation of indebtedness of counties? But there is another *fundamental distinction* between these two constitutional provisions. The language of the Missouri constitution is that "*no county shall be allowed to become indebted*," while the Colorado constitution declares that "*the aggregate amount of indebtedness of any county shall not at any time exceed*" a certain amount. It is barely possible (though erroneous) to say that the language of the Missouri instrument points to the voluntary action of the corporate authorities of the county as the power upon which it expends its force, but the language of the Colorado constitution does not admit of any such interpretation. We therefore submit that the Missouri decision in so far as it recognizes the argument *ab inconvenienti* is no precedent for the facts of the cases before the court, and, in so far as it attempts to recognize any general principle that constitutional limitations do not restrain legislative power, it is *bad law* at home and *no law* in Colorado. The same court rendered another decision. (Book vs. Earl 87 Mo. 246). This was a case where the statute authorized the county court to alter, repair or build county buildings, and required them to be preserved from waste and damage, but the court held that this authority and this requirement were subordinate to the constitutional limitation. This decision is not consistent with any general proposition that any and all commands of the legislative department of the state government are excepted from the constitutional limitation, and would be sufficient, in itself, if recognized as law, to establish the validity of by far the larger part of the warrants which were replaced by these funding bonds, and those which are in suit in the other case.

We have demonstrated from the *agreed statement of facts*, in our opening argument in this case (pp. 6–16), that these

bonds were issued for all classes of warrants, entirely irrespective of whether such warrants were issued upon obligations which were contractual or compulsory in their origin and nature. It is wholly immaterial, therefore, as to whether or not there is a presumption in favor of the bonds, to the effect that the indebtedness which was funded was valid, because the *fact* is made to otherwise appear, and the *presumption* is thus *overcome.* We have also shown in our opening argument (pp. 16–22) that there is *no estoppel* against showing this fact, and we will not resume the discussion upon this question. The treatment of many of the questions involved might be elaborated, and many considerations presented which we have not touched upon; but we feel that we have made a reasonable (or at least a conscientious) effort, to afford the court that assistance in arriving at a just result which is due from its officers. We have recognized the fact that the amount involved is large, but we submit that, as compared with the *principles* involved, any mere matter of dollars and cents sink into *insignificance.* If this constitutional provision is *plain in its language* and *single in its purpose,* then any attempt, however successful it may seem to be, to *evade or overthrow it,* teaches to the people of the country a lesson of *lawlessness,* and gives rise to a sense of *insecurity,* even as to those rights which are guaranteed by the supreme law of the land, which are pernicious in their effects. We remember the time when *treason* even attempted to *disguise* itself under *constitutional construction.* How much worse in his example is the open violator of law than any man must be who closes his eye to its *plain requirements,* and attempts to evade the law by reasoning away its *obvious mandates?* This is something that *this* tribunal has never done, and, we feel confident, never will do. In conclusion we submit, as we have before con-

tended, that the people of Colorady have adopted a *plain* constitutional provision; that it has been honestly and properly construed by the supreme court of the state (the Chief Justice of which was a member of the constitutional convention) and that to disregard that construction and the plain terms of the constitution will be to *create* and not to *construe*.

DANIEL E. PARKS and
H. B. JOHNSON,
Attorneys for Plaintiff in Error.